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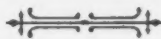
Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States



ERNEST T. CARLETTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO SUPREME
COURT OF THE STATE OF DELAWARE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Supreme Court of Delaware err and violate the Defendant's right to counsel, under the Sixth (6th) Amendment to the United States' Constitution, when it affirmed the Trial Court's refusal of a very brief continuance to permit the Defendant to substitute counsel where original counsel was uncommunicative, professionally distracted and unprepared, and where there was no good nor compelling reason to deny the continuance which was made in advance of trial?

Proposed Answer: Yes.

PARTIES BELOW

The parties before The Supreme Court of the State of Delaware were as follows:

1. The Petitioner, Ernest T. Carletti, represented by private counsel, Matthrew R. Fogg, Esquire of Wilmington, Delaware.

2. The State of Delaware was represented by Paul R. Wallace, Esquire, Chief of Appeals, and Loren C. Myers, Esquire, Deputy Attorney General, with offices at Department of Justice, Carvel State Office Building, 820 North French Street, 7th Floor, Wilmington, Delaware, 19801.

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APPENDIX

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The Petitioner, Ernest T. Carletti, prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of Delaware entered on December 3, 2008. (Appendix A)

I. CITATION TO OPINIONS BELOW

The Honorable Jan R. Jurden, of the Superior Court of Delaware, sat as a trial judge and has issued an Opinion in this matter on State of Delaware Docket Number, ID # 0609-010043. However, Judge Jurden's Opinion did not address the issue herein.

The Supreme Court of the State of Delaware has issued its Opinion and Order, dated December 3, 2008 and a copy of same is being attached hereto in the (Appendix A)

II. JURISDICTION

The Judgment of The Supreme Court of the State of Delaware was entered on December 3, 2008. A Petition for Writ of Certiorari was to be filed with the Clerk of the Court of The United States Supreme Court on or before March 3, 2009.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

The Delaware Supreme Court extensively discussed the holding of United States v. Gonzalez-Lopez, 548 U.S. 140 (2006), in its Opinion. The federal issue has been properly raised and preserved pursuant to the holding in Jenkins v. Georgia, 418 U.S. 153 (1974).

III. CITATION TO APPLICABLE STATUTES AND TREATIES

1. It is the Sixth (6th) Amendment to the United States Constitution, which is the subject matter of this petition. The verbatim of the Sixth Amendment is found in the attached (Appendix E)

STATEMENT OF THE CASE

On September 18, 2006, the Petitioner was arrested and charged with various crimes, including rape and related offenses. An initial scheduling Order, issued on November 2, 2006, set a trial date of March 29, 2007. In early December 2006, a Superior Court judge was specially assigned to the case and, on December 26, 2006, the State moved for a continuance as the victim wanted her father to be present during trial and the victim's father was to be out of town on a business trip during March 2007. The continuance request of the State was granted on January 3, 2007. Later, and on March 19, 2007, a trial date of September 3, 2007 was set. However, in May 2007, defense counsel learned that a different Superior Court judge had set September 3, as the starting date for a first degree murder trial and, hence, counsel was unavailable for this case. That continuance request was granted, and a trial date of November 13, 2007 was set.

Thereafter, and on or about October 26, 2007, another attorney moved to have a Maryland attorney admitted, *pro hac vice*, in the case and, simultaneously, moved for a continuance so that the Maryland attorney could prepare for trial. After hearing argument on the continuance request, the Trial Judge

denied the request. (See Appendix F, pg. 48a).¹

Thereafter, and on November 13, 2007, the case proceeded to trial and, on November 19, 2007, the Defendant was convicted on two (2) counts of rape in the first degree and kidnapping. He was later sentenced. The Defendant appealed to the Supreme Court of Delaware, which affirmed on December 3, 2008.

The evidence from trial is not summarized herein, as it is not in issue before the Court. The sole factual/legal issue before the Court flows from the hearing on October 31, 2007, before the Honorable Jan R. Jurden.

The victim alleged that she had been sexually assaulted on May 22, 2003. The Defendant was arrested on September 18, 2006, and indicted on October 2, 2006, (Appendix F, pg. 50a). In November 2006, the Court set March 29, 2007 as a trial date, (Appendix F, pg. 50a).

In December 2006, the State learned that the victim's father would be out of town in March 2007 and not available for trial and, thus, requested a con-

¹ See also, "Nature and stage of the proceedings, attached from the Brief filed by the Prosecution in the Delaware Supreme Court, at Appendix, page a statement of the procedural history is uncontested.

tinuance. The Defendant, though incarcerated, did not oppose the request for continuance, (Appendix F, pg. 51a).

The new trial date was September 3, 2007 but, in May 2007, defense counsel learned that Judge Vaughn had scheduled him to begin a murder trial on September 3, 2007, (Appendix F, pg. 51a).

Defense counsel moved for a continuance and a new trial date of November 13, 2007 was set, (Appendix F, 52a).

The Defendant was represented by Joseph A. Hurley, Esquire. Mr. Hurley represented to the Court that he agreed that the Petitioner herein should have a new attorney, (Appendix F, 56a). He claimed that he could give a "workman-like performance" on November 13, but also represented to the Court that, because of his other trial commitments, he had not yet reviewed the evidence in this case. He also admitted that he had not answered twenty (20) to thirty (30) of the Defendant's letters to him. (Appendix F, 57a-59a).

Attorney Aaronson (local counsel) and Attorney Pavlinic (new counsel of choice for Petitioner), were both in Court. Mr. Pavlinic had been retained; he was in Court to answer any of the Court's questions; he needed to be admitted *pro hac vice*; he had been admitted *pro hac vice* on one previous occasion in Delaware and had successfully represented a criminal defendant, (Appendix F, 65a-66a).

Mr. Pavlinic represented that he could be ready within sixty (60) days and would be available in January 2008, (Appendix F, pg. 67a). He then represented to the Court that he could put the case on in December 2007, (Appendix F, pg. 68a). The Prosecutor had a busy calendar in December 2007 and was not generally available during that month. (Appendix F, pg. 71a).

The Prosecutor was also concerned about the memory of witnesses fading, (Appendix F., pg. 69a). However, the Prosecutor then noted that he would have been concerned if it had been a six (6) month continuance and did not understand that he was looking at a one (1) or two (2) month continuance, (Appendix F, pgs. 75a-76a).

The Defendant, Petitioner herein, addressed the Court and advised that he had not seen his attorney for ten (10) months. He did not feel that his attorney was prepared. He felt that the need for a different attorney was in his "best interest". (Appendix F, pg. 78a).

Later that day, the Court issued its decision, via a letter dated October 31, 2007, and denied the Defendant's motion. The case proceeded to trial and verdict as aforesaid.

REASONS FOR GRANTING THE WRIT

I. Certiorari should be granted as the Supreme Court of Delaware has decided an important federal question in a way that conflicts with relevant decisions of this Court. More specifically, the decision of the Delaware Supreme Court violated the Defendant's Sixth Amendment right to counsel and would violate the fundamental holdings of this Court in both *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) and *Morris v. Slappy*, 461 U.S. 1 (1983).

In *Gonzalez-Lopez*, this Court discussed rights guaranteed to a criminal defendant pursuant to the Sixth Amendment, and said:

The Sixth Amendment provides that, "In all criminal prosecutions, the accused shall enjoy the right . . . To have the Assistance of Counsel for his defense". We have previously held that an element of this right is the right of a defendant who does not require appointed counsel, to choose who will represent him. See *Wheat v. United States*,
 486 U.S. 153 (1988).²

² *Parallel citations omitted.*

The Court then reviewed the matter to determine whether the issue needed to be evaluated pursuant to the harmless error doctrine, but concluded that said doctrine did not apply. The Court noted that choice of counsel was a "structural defect" and said:

These "defy analysis by 'harmless error' standards" because they "affect the framework within which the trial proceeds" . . .

Most importantly, and applicable in the analysis herein, is the Court's finding that:

A choice of counsel violation occurs whenever (emphasis in original) the defendant's choice is wrongfully denied. . . . We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness . . . and against the demands of its calendar, *Morris v. Slappy*, 461 U.S. 1 (1983).³

The Court remanded for a new trial. The Petitioner was represented at all times by private counsel and wished to substitute one private attorney for another.

In *Morris v. Slappy*, supra., the defendant had been charged with sex crimes and was being represented by a trial lawyer in San Francisco's Public Defenders' office. Trial counsel became ill six days

³ *Parallel citations omitted.*

before trial and the office assigned another attorney, who was a senior trial attorney in the office, to represent the defendant. The defendant in that matter motioned the Trial Court on the first day of trial for a continuance. The Trial Court questioned the newly assigned trial attorney, who explained that he had reviewed the case, interviewed the defendant, was from the same office as previous trial counsel, and further represented that further time would not benefit him in presenting the case. Thereafter, the defendant made a mid-trial motion for a delay to permit his original Public Defender to represent him. However, he did not do that until the third day of trial. This Court ruled that the Trial Court was justified in denying that defendant's mid-trial motion for continuance.

This Court, in its holding, noted that the Trial Court had the benefit of an unequivocal and uncontradicted statement by a responsible officer of the Court, that he was fully prepared and ready for trial. More specifically, the Court held:

Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place, at the same time, and this burdens counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances; only in unreasoning and arbitrary "insistence upon

expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel. *Ungar v. Sarafite*, 376 U.S. 575 (1964).⁴

While the Morris Court placed great importance upon the interest of a victim whenever a new trial must be ordered, the Court also said:

Of course, inconvenience and embarrassment to witnesses cannot justify failing to enforce constitutional rights of an accused: When prejudicial error is made that clearly impairs a defendant's constitutional rights, the burden of a new trial must be borne by the prosecution, the Courts and the witnesses; the Constitution permits nothing less.

Nothing less should be permitted herein.

The Delaware Supreme Court noted its obligation to follow the law announced in *Gonzalez-Lopez*. It then cited two cases from the Delaware Supreme Court, *Stevenson v. State*, 709 A. 2d 619 (Del. 1997) and *Riley v. State*, 496 A. 2d 997 (Del. 1985) for the proposition that the Trial Court in this matter had acted appropriately. The trial in *Stevenson* involved co-defendants. Mr. Stevenson requested a continuance to obtain counsel on the first day of trial, with co-defendant sitting at counsel table. A co-defendant

⁴ *Parallel cites omitted.*

opposed Mr. Stevenson's application for a continuance. The Delaware Supreme Court considered all of the circumstances and found that the Trial Court had acted appropriately. In Riley, not only was the request made on the day that trial was to begin, it was made by a defendant who had not yet retained a new attorney. The Delaware Supreme Court again upheld the Trial Court under all of those circumstances.

The facts before Judge Jurden were unlike the factual predicates of the Stevenson and Riley cases. Furthermore the decisions in Stevenson and Riley would not have been a basis for Judge Jurden to have violated this Defendant's rights under the Sixth Amendment if the decisions in Stevenson and Riley were themselves violative of a defendant's Sixth Amendment right.

However, and on the facts, it appears that the Trial Courts in Stevenson and Riley appropriately denied the requests that were made by the Defendant in those cases. The facts in the instant matter are palpably different.

The Delaware Supreme Court, at page 14 of its Opinion, noted that the request came nearly "four and one-half (4-1/2) years" after the assault. That language does not accurately reflect what occurred. The Defendant was not arrested until September 18, 2006. Thus, much time had passed after the incident had occurred and the delay cannot be attributed to the case lingering on a court calendar. The

Prosecution did not proceed until September 18, 2006, when the Defendant was arrested.

The Delaware Supreme Court noted that the State had a significant interest in proceeding to trial as scheduled. All parties always have a significant interest in proceeding to trial as scheduled, no matter when the case is scheduled. However, and as all litigants and attorneys know, continuances are part and parcel of litigation and sometimes need to be requested, and sometimes need to be requested and sometimes need to be granted. A subpoena can always be re-issued.

The Supreme Court also noted that the Trial Court had granted two continuances on previous occasion, one to the State and one to the Defendant. While technically correct, it does not, perhaps, reflect reality. Although the victim had an interest in proceeding to trial as quickly as possible, she, herself, requested a continuance so that she could have family support at trial. The incarcerated Defendant did not oppose that reasonable request. It is true that the defense requested, and was granted a continuance. However, that request had absolutely, positively nothing to do with this Defendant; it had everything to do with trial counsel being busy, and perhaps too busy, and having had a murder trial scheduled on the same day that this rape trial was supposed to have begun. It appears that the murder trial was scheduled by a different judge and, perhaps, in the absence of Attorney Hurley. Thus, and while technically a "defense request", the necessity

for the request was brought about as a result of a conflict in the Court's own scheduling and where one judge did not know that another judge already had Mr. Hurley scheduled for trial. If anything, the Defendant, who was incarcerated, did not benefit by such a request, as he had to sit and wait for a longer period of time for his day in Court. Thus, and in essence, one continuance should be attributed to the Prosecution and one should be attributed to the crowded court calendar.

The Delaware Supreme Court, noting the decision in *Ungar v. Sarafite*, supra., found that there were no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process and said that the answer must be found in the circumstances present in every case. That is true. The Second Circuit, in *United States v. John Doe #1*, 272 F. 3d 116 (2d Cir. 2001), applied a three (3) factor test in evaluating whether a District Court abused its discretion in denying a Motion to Substitute Counsel, with the factors being as follows:

- (1) Whether defendant made a timely motion requesting new counsel;
- (2) Whether the Trial Court adequately inquired into the matter; and
- (3) Whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication preventing an adequate defense.

That Court also called upon the decision in *Romero v. Furlong*, 215 F. 3rd 1107 (10th Cir. 2000) [citing *Brown v. Craven*, 424 F. 2d 1156 (9th Cir. 1970)], for a fourth factor, to wit: "Whether the defendant substantially, and unjustifiably, contributed to the break down in communication."

In evaluating all of these factors, the record reflects that the Defendant filed his motion for change of counsel eighteen (18) days prior to the beginning of trial. Whether that is a "timely motion" depends on how it is analyzed. It is certainly not a day of trial motion, as was found in *Stevenson, supra.* and *Riley, supra.* It was not a mid-trial motion, as was made in *Morris, supra.* While three (3) months earlier would have been better, almost three weeks before trial was to begin would still have given the parties an adequate opportunity to "stand down" without gross inconvenience.

The Trial Court did inquire into the request. It did schedule a hearing. The inquiry seems to have been appropriate.

That same inquiry reflects that the conflict between the attorneys and his client was so great that it had actually resulted in a total lack of communication for a period of ten (10) months. During that time, the attorneys had not personally seen his clients. Attorneys can be busy. However, the defendant had made every conceivable effort to contact the attorney with the attorney admitting that the

Defendant had written on twenty to thirty occasions, and where the attorney did not write back on even a single occasion. Thus, there was, in fact, a total lack of communication.

Lastly, the Defendant did not substantially, nor unjustifiably, contribute to the breakdown in communication; rather, the breakdown was absolutely, one hundred percent (100%) the fault of the trial attorney, who was privately retained.

Thus, the Trial Court was confronted with a situation where the attorney, for whatever his personal reasons, had ceased to communicate with his client, and where the client wanted a new attorney to represent him. The client had, through his family, retained a new attorney, who was present in the courtroom and answered all of the Trial Court's questions. The request for continuance so that the new attorney could be prepared was not an outrageous request. Moreover, it certainly seems that the State was originally opposed because it thought it would be looking at a six (6) month continuance and had seemingly backed off from its stiff opposition when it learned that it would be looking at a short continuance only. Moreover, it appears from the record, that the new attorney could be ready within a month or six (6) weeks and try the case during December, but where the prosecution would not be ready and/or available. Thus, the continuance would have had to be for another three (3) or four (4) weeks, and until after Christmas.

Moreover, any contention that the Defendant was interfering with the orderly administration of justice in the Court calendar is simply not true and is belied by the record. This case appears to have proceeded in the usual course, in the State of Delaware, and was continued on one occasion at the request of the Prosecutor, so as to convenience the victim and her family. Properly so. The other request was necessitated by the conflict in the original trial attorney's schedule, and that had nothing to do with the Defendant.

Lastly, and perhaps the weakest part of the Defendant's claim, is his own statement on the record, before the Trial Judge. He did not throw Mr. Hurley "under the bus". The Petitioner herein did his best to articulate why he wanted a new attorney. To his credit, he did not, like many defendants, claim that his attorney was conspiring with the Prosecution; was not on his side; or was stealing his money. Rather, and in a gentlemanly fashion, the Petitioner simply stated that he did not have a working relationship with counsel and felt that new counsel was in his best interest.

If the Defendant's statement had been made in a vacuum, then perhaps, the Trial Court would have been more justified in determining that it did not have enough to grant the continuance. However, the Defendant's testimony must be read in conjunction with Mr. Hurley's own remarks to the Court. The Trial Court may have been thinking the same thing when it inquired:

Because what I'm concerned about is, did Mr. Hurley accurately state your reservations?

(Appendix F, pg.76a).

The Defendant, perhaps not fully understanding the question, answered as follows:

In the beginning, yes. I haven't seen Mr. Hurley for approximately ten months.

(Appendix F, pg. 77a)

Mr. Hurley's amplification of the record is significant. He had been in the case for at least ten (10) months and, apparently, had done little to prepare for trial. His own words are revealing:

At this point, since I got out of the Russian case last week, I have spent twenty to thirty hours solely on this case, and that includes doing some things that should have been done before, which were to file motions to suppress evidence. . . . It also includes the 3508 Motion, which has now been filed seeking to get into the sexual history of the complaining witness. . . . What has not been done at this point in time, and remains to be done, and there is sufficient time to do it, is to review all of the evidence in this case. Other than that, between now and the 13th, I would be devoting myself almost entirely to this and I would expect to put in another fifteen to thirty to forty hours dealing with

this case, and this case alone, because this is a "six-coat of paint" case.

(Appendix F, pgs. 57a-58a).

The Petitioner was well within his rights to be upset and concerned and to want new counsel. By reputation, Mr. Hurley is an accomplished attorney and well respected in the State of Delaware. That is why the Petitioner hired him. However, in this particular case, Attorney Hurley simply did not do what any qualified attorney would do. It is inconceivable that any good attorney would take on the representation of an individual in a very serious case such as this, and then fail to see his client over a ten month period; fail to write back after receiving twenty to thirty letters from the client; fail to review the evidence; fail to file pretrial motions to suppress evidence; fail to file a "sexual history" motion; and otherwise, utterly fail to prepare.

On October 31, 2007, Attorney Hurley was unprepared to represent his client. He believed that he would become prepared in the following thirteen (13) days. On the other hand, newly proposed counsel would have been prepared and available four to five weeks after November 13, 2007.

If the Court was going to be upset at anyone, the Court should have been upset with Mr. Hurley. It was Mr. Hurley's inattention, not merely to detail, but to everything, that caused the client to lose confidence in Mr. Hurley and caused the client to be unprepared for trial as of October 31, 2007.

Later, and at trial, it became apparent that Mr. Hurley was not merely attempting to go along with his client when he represented to the Court, at the hearing on the continuance, that he was not ready. Corroborative of efforts, or lack of same in this matter, is Mr. Hurley's confusion with regard to what his client was charged with. Apparently, the State's attorney had caused some confusion with regard to the counts involved; however, Mr. Hurley came to believe that his client was not on trial on the charge of "rape while kidnapping". His client was on trial for that charge. The Court ruled that, while the State had caused some of the confusion, it was equally true that defense counsel knew that his client was charged with kidnapping. Defense counsel then moved for a mistrial (claiming ineffectiveness) because he did not know that his client was on trial for kidnapping. (Appendix F, pgs. 85a-96a).

Clearly, the defendant herein is not seeking relief because of ineffective assistance of counsel. However, this is exactly why the Court should have granted the Defendant permission to bring in new counsel and to grant a short continuance. Mr. Hurley said he was not ready on the day of the continuance hearing, and he was not ready at that point and was not ready at the trial.

While the Morris Court held that there was no constitutional guarantee to a "meaningful" relationship with an attorney, that decision does not stand for the proposition that a client is not entitled to "any relationship" with his attorney. Moreover, the attorney in Morris represented to the Court that he

was prepared for trial, while the attorney herein represented to the Court that, as of the day of the request for continuance, he was not prepared and would need up until trial to become prepared.

In short, the Defendant has a Sixth Amendment guarantee of counsel, and counsel of his choice. While our trial courts have discretion in granting continuances, so that a litigant can bring in a new counsel of his choice, that discretion can be abused by a court and was certainly abused by the Trial Court in this matter. The Delaware Supreme Court erred when it failed to grant this Petitioner a new trial.

This Court should grant this Petition for a Writ of Certiorari because this Defendant's rights, under the Sixth Amendment, were abrogated and, of equal importance, the Writ should be granted so that the highest Courts of our many states are clearly advised that a reasonable request because of unusual, if not extraordinary circumstances, should be granted so as not to violate the Sixth Amendment rights of other possible litigants.

For all of the above reasons, the undersigned would respectfully urge this Honorable Court to grant this Writ.

CONCLUSION

The Court should grant Writ of Certiorari in this matter to this Petitioner.

Respectfully submitted,

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1a

**APPENDIX A – SUPREME COURT OF
DELAWARE OPINION (NON-
PRECEDENTIAL), FILED DECEMBER 3, 2008**

EFiled: Dec 3, 2008 11:41 AM
Filing ID 22733994
Case Number 53,2008

**IN THE SUPREME COURT OF THE STATE OF
DELAWARE**

ERNEST T. CARLETTI,

No. 53, 2008

**Defendant Below-
Appellant,**

**Court Below: Superior
Court of the State of De-
laware in and for New
Castle County**

v.

STATE OF DELAWARE

ID No. 0609010043

**Plaintiff Below-
Appellee.**

**Submitted: October 3, 2008
Decided: December 3, 2008**

Before **STEELE**, Chief Justice, **BERGER**, and **RIDGELY**, Justices.

O R D E R

This 3rd day of December 2008, it appears to the Court that:

(1) Defendant-Appellant Ernest Carletti appeals from his Superior Court Convictions of two counts of rape in the first degree and one count of kidnapping. Carletti makes two arguments on appeal. First, he contends that the court violated his Double Jeopardy protections by concluding that two separate rape offenses had occurred. Second, he contends that the court abused its discretion in denying his motion for a continuance filed eighteen days prior to trial in order to obtain substitute counsel. We find no merit to his arguments and affirm.

(2) On the evening of May 21, 2003, J.S.¹, a nineteen-year old freshman at the University of Delaware, attended a party to celebrate the end of classes. She had two beers and left around 1:30 a.m. Before she left, J.S. called a friend to meet her along the way and accompany her back to her dormitory.

¹ The Initials represent a pseudonym we have assigned to the victim on appeal pursuant to DEL.SUPR. CT. R. 7(d).

When she did not see her friend at their designated meeting place, J.S. sat down and waited.

(3) While J.S. was waiting, a dark-colored sedan pulled up and the driver, Carletti, propositioned her, offering \$100 if she would put on handcuffs. J.S. refused, but Carletti persisted. Eventually, Carletti displayed what appeared to be a chrome handgun and pulled J.S. into the car. Once she was in the passenger seat, Carletti pushed J.S.'s face into her lap, blindfolded her with duct tape, handcuffed her hands behind her back, and shackled her ankles. He then drove for approximately twenty to twenty-five minutes, after which J.S. remembered getting out of the car, walking on gravel, then long grass, and then being dragged into a house. Once inside, she was taken down steps into a basement and placed on a couch after walking on a wooden floor.

(4) After being placed on the couch J.S. testified that Carletti began to kiss her; when she resisted, he pinched her breasts and nipples. He then took her--still bound, shackled, handcuffed, and blindfolded--from the couch to the floor. She testified that he placed her before him on her knees on the floor and, after putting on a condom, forced his penis into her mouth. J.S. resisted and Carletti grew impatient, eventually taking his penis from her mouth and returning her to the couch. She was then left alone in the basement--still bound, shackled, handcuffed, and blindfolded--for about five or ten minutes while Carletti went upstairs. She heard the sound of Carletti and dogs walking above.

(5) J.S. testified that Carletti came back downstairs and began kissing her again, but she again resisited. He then removed the handcuffs, removed her jacket, and recuffed her. He also removed J.S.'s shoes and replaced them with some sort of "heavy or rubbery shoes." Carletti again took her from the house to the floor, placing her in a kneeling position. He again forced his penis into her mouth, but again became frustrated because J.S. "wasn't doing what he said," and he again removed his penis from her mouth. J.S. was not certain how long this second incident lasted, but she believed it was shorter than the first.

(6) According to J.S.'s testimony, Carletti then took her from the floor and placed her on her stomach on a padded table-still bound, shackled, handcuffed, and blindfolded. He then connected chains to the handcuffs and ankle shackles and placed something around her neck. She was hoisted up by the chains and a ball gag was placed in her mouth. As she hung from the chains by her hands and feet, she had difficulty breathing and could hear someone masturbating. At the same time, she heard Carletti give her orders, telling her to say "yes, master" to him. Eventually, unable to breathe, her head dropped. She was then released from the chains and dropped to the table.

(7) Carletti then took J.S. from the house-still bound, shackled, handcuffed, and blindfolded-and put her back in the car. On the way back to campus,

Carletti apologized to J.S. but told her not tell anyone. He then removed the ankle shackles and the handcuffs, securing her hands behind her with duct tape, and pushed her out of the car. J.S. started to scream for help and tore herself out of the tape. She ran back to her dorm room and notified the police.

(8) Detective Keld interviewed and photographed J.S. in the early morning hours of May 22, 2003. She had marks on her wrists and ankles from the handcuffs and shackles. The next day, Detective Keld and J.S. returned to the spot where she had been left the night before and located the duct tape. A year later, after little progress was made in indentifying J.S.'s attacker, a composite sketch was prepared. Carletti's fingerprint was recovered from the duct tape and it was determined that he had owned a black sedan in 2003. A walkthrough of Carletti's home corroborated a number of the details supplied by J.S.: there was a gravel driveway, the basement of the house had wooden floors with area rugs, there was a padded weight bend, and an I-beam in the ceiling of the basement.

(9) On September 18, 2006, Carletti was arrested and charged with six counts of rape in the first degree, one count of kidnapping, and one count of possession of a deadly weapon during the commission of a felony. He was indicted on October 2, 2006. On November 28, 2006, Carletti moved for dismissal of five of the rape charges based on the multiplicity doctrine. The superior Court granted the motion in part, dismissing Counts III, IV, V and VI-effectively merging Counts I, III and V, and Counts II, IV, and VI

into two charges of first degree rape based on physical injury caused during the act of non-consensual intercourse.² On June 15, 2007, the court granted the State's request that the court dismiss Counts I and II and reinstate Counts V and VI, to enable the State of proceed on the "rape while kidnapped" theory charged in Counts V and VI.

(10) The Initial scheduling order issued November 2, 2006, set a trial date for March 29, 2007. However, on December 26, 2006, the State moved for a continuance to allow J.S.'s father to be present during the trial to provide support. That request was granted on January 3, 2007 and a new trial date was set for September 3, 2007. In May 2007, defense counsel moved for a continuance due to a scheduling conflict. That request was granted and, on August 28, 2007, the court entered a scheduling order setting a trial date for November 12, 2007. On October

² Counts I and II charged Carletti with two acts of intercourse during which he caused physical injury in violation of 11 Del. C §773(a)(1). Counts III and IV charged Carletti with two acts of intercourse during which he displayed or represented he possessed a deadly weapon in violation of 11 Del C. § 773(a)(3). Counts V and VI charged Carletti with two acts of intercourse during the commission of a felony (kidnapping) in violation of 11 Del. C. § 773(a)(2)(a). The court found that Carletti could be convicted for "each separate and distinct act," but "dissect[ing] a statute, apply[ing] a single act to the subparts, and permit[ing] multiple counts of the same statute based on one act violated the multiplicity doctrine.

26, eighteen days before trial was set to begin, defense counsel sought to withdraw and another attorney moved to have a Maryland attorney admitted *pro hac vice* in the case. She also moved for a third continuance to allow the Maryland attorney time to prepare for trial. After a hearing, the court denied the request.

(11) On November 13, the case proceeded to trial as scheduled with original defense counsel. J.S. identified Carletti as the man who had abducted and raped her. Carletti testified in his own defense. He admitted that he was the man who took J.S. from the corner in Newark; however, he denied any criminal wrongdoing, claiming only that "things went a little too far."

(12) On November 19, 2007, Carletti was convicted of two counts of rape in the first degree and one count of kidnapping. Carletti filed a timely motion for judgment of acquittal on November 26, 2007, again claiming that his convictions violated the multiplicity doctrine. The motion was denied on January 17, 2008. He was sentenced on January 31, 2008 and this appeal followed.

(13) Carletti first contends that the Superior Court erred in denying his motion to dismiss Counts I and II as being part of the same course of conduct, thereby violating the Double Jeopardy clause of the United States Constitution. We review *de novo* both

a claim for infringement of constitutional rights³ and denial of an application for merger.⁴ We review the denial of a motion to dismiss counts of an indictment for abuse of discretion.⁵

(14) The Double Jeopardy Clause of the Fifth Amendment guarantees that no persons shall "be subject for the same offense to be twice put in jeopardy of life and limb."⁶ "the constitutional principal of double jeopardy protects a defendant against (1) successive prosecutions; (2) multiple charges under separate statutes requiring proof of the same factual elements; and (3) multiple charges under the same statute."⁷ Multiplicity occurs when an individual is charged with more than one count of a single offense.⁸ Generally, "[d]ividing one offense into "multiple counts of an indictment violated the double

³ *Williamson v. State*, 707 A.2d 350, 362 (De. 1998).

⁴ *Williams v. State*, 818 A.2d 906, 909 (Del. 2002).

⁵ *State v. Harris*, 616 A.2d 288, 291 (Del. 1992).

⁶ U.S. Const. Amend. V.; Del Const. art I, § 8.

⁷ *Williams v. State*, 796 A.2d 1281, 1285 (Del. 2002) (citing *Schiro v. Farley*, 510 U.S. 222, 229-30 (1994) *Blockburger v. U.S.*, 284 U.S. 299 (1932); *U.S. v. Forman*, 180 F.3d 766, 769 (6th Cir. 1999)); see also *Washington v. State*, 836 A.2d 485, 487 (Del. 2003).

⁸ *Feddiman v. State*, 558 A.2d 278, 288 (Del.1989)

jeopardy provisions of the constitution of the State of Delaware and of the United States.”⁹

(15) In *Wyant v State*,¹⁰ we held that in the context of sexual assault, “[w]hether a course of conduct involving multiple sexual assaults permits prosecution for more than one statutory offense, of rape, ultimately turns on the facts, particularly the timing between the sexual acts and the physical movement of the victim between the acts.” In that case, the defendant entered the victim’s home and attempted to rape her by anal intercourse downstairs. He then vaginally raped the victim and thereafter forced her upstairs, where he committed a further act of rape and sexual assaults. The defendant then forced the victim back downstairs where he raped her again.¹¹ We found that these facts supported the defendant’s multiple convictions for two counts of rape and one count of attempted rape.

(16) In *Feddiman v. State*,¹² we also found the facts supported multiple convictions of rape. In that case, the defendant ordered the victim to get in his car and ordered her to perform oral sex on him while he

⁹ Williams, 796 A.2d at 1285 (quoting *Feddiman*, 558 A.2d at 288)

¹⁰ 519 A.2d 649, 661 (Del. 1986) (citing *Harrell v. State*, 277 N.W.2d 462, 469 (Wis. 1979)).

¹¹ *Id.* at 652

¹² 558 A.2d 278 (Del. 1989).

was driving. He then stopped at a beach and, while still in the car, ordered the woman to engage in vaginal intercourse, and then forced her to again perform oral sex on him. The defendant then forced the victim out of the car and onto her knees and again demanded that she perform fellatio. He then took her back to the car and forced her to engage in vaginal intercourse. The defendant then left the beach area with the victim and drove fifteen minutes away, where he forced her to have vaginal intercourse again. He then walked her from the car to the edge of a pit, but took her back to the car where he forced her to perform oral sex on him again. Finally, the defendant removed the victim from the car and forced her to engage in vaginal intercourse.¹³

(17) Feddiman was charged with eight separate counts of unlawful sexual intercourse in the first degree. We rejected his multiplicity challenge, finding that the “allegations in record of the variations in the sexual acts, the physical movement of the victim between the acts, and the timing between the sexual acts, was sufficient to support [the defendant’s] prosecution for eight separate offenses....”¹⁴ We further explained that:

This court has previously held that a “continuum of criminal activity can constitute a violation of several distinct criminal stat-

¹³ Id. at 280-81

¹⁴ Id. at 289

utes if each statutory provision requires proof of a fact the other does not." Similarly, "[a] person who commits multiple sexual assaults upon the same victim may be held responsible for, and punished for, *each separate and distinct act*," albeit a violation of the same statute. One is not allowed to "take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed. Each act is a further denigration of the victim's integrity and a further danger to the victim."¹⁵

¹⁵ Id. at 288-89 (quoting *Weber v. State*, 547 A.2d 948, 962 (1988)(emphasis added); *Harrell*, 277 N.W.2d at 469, 471). We further quoted with approval a Tennessee case in a footnote: [W]e do not agree that a man who has raped a woman once may again assault and ravish her with impunity, at another time and at another place as was done here. An intent was formed to rape her again. The evidence of the second rape was entirely additional to that of the first. Additional orders were given to the captive female, an intent to have her again was formed and was manifested, and the crime committed. Certainly there was separate and additional fear, humiliation and danger to the victim. We hold that separate acts of rape, commit-

(18) In contrast, in *Williams v. State*,¹⁶ we held that the defendant's conviction for two counts of possession with intent to deliver cocaine was multiplicitous. In that case, the two counts of **PWID** were based on two separate searches, in two different locations: one in the defendant's car, the other in the defendant's home.¹⁷ We adopted a test based on intent and found that because the defendant had one intended purpose for all the cocaine discovered, he could only be charged with one count of **PWID**.¹⁸ We reconciled this holding with *Feddiman* by explaining that in *Feddiman*, for each separate and distinct sexual act, the defendant "formulated the intent to commit each assault and separately violated the same statute numerous times during one continuous attack of the victim."¹⁹ The defendant in *Williams* "did not formulate two separate intents to distribute

ted at different times and places and the produce of several intents, are severally punishable.

Id. at 289 n.28 (quoting *Lillard v. State*, 528 S.W.2d 207, 211 (Tenn. Crim. App. 1975)).

¹⁶ 796 A.2d 1281, 1283 (Del. 2002).

¹⁷ Id. at 1283-84.

¹⁸ Id. at 1285-86.

¹⁹ Id. at 1288.

cocaine even though he separated the cocaine into different caches.”²⁰

(19) We addressed multiplicity more recently in *Pierce v. State*,²¹ where the defendant attacked an apartment manager in the office of the apartment complex. He first attempted to vaginally rape the victim in a bathroom by forcing her to kneel in front of the bathtub. He then immediately moved her to the toilet next to the bathtub and attempted to penetrate her again in the same manner.²² Failing in his second attempt, the defendant forced the victim into a bedroom where he committed vaginal rape. He then forced the victim back into the bathroom and vaginally raped her again.²³ The four acts of rape occurred within a span of less than fifteen minutes.²⁴ We found that rather than a single, ongoing incident, the evidence indicated “a sufficient break in conduct and time to constitute separate and distinct crimes.”²⁵ Thus, we found that the defendant committed four separate sexual acts.

²⁰ Id.

²¹ 911 A.2d 793 (Del.2006).

²² *Pierce*, 911 A.2d at 795.

²³ Id. at 795

²⁴ Id.

²⁵ Id. at 797.

(20) Here, each assault was clearly defined by Carletti moving the defendant to the floor. Each assault had its own beginning and end. Each assault was separated by at least five minutes. In between the incidents, Carletti left K.S. alone, he also temporarily released her from her handcuffs, removed her jacket and changed her shoes. Each assault created a separate and additional fear, humiliation and danger to J.S. Unlike the defendant in *Williams*, Carletti formulated the intent to commit each assault and separately violated the same statute twice. Rather than a single, ongoing incident, the evidence indicated "a sufficient break in conduct and time to constitute separate and distinct crimes." Carletti's argument is without merit.

(21) Carletti next contends that the Superior Court erred in denying his request for a continuance to allow counsel of his choice to enter the case. We review the denial of a request for a continuance for the purpose of securing new counsel for abuse of discretion.²⁶

(22) In *United States v. Gonzales-Lopez*,²⁷ the United States Supreme Court stated that the erro-

²⁶ *Stevenson v. State*, 709 A.2d 619, 631 (Del. 1997); *Riley v. State*, 496 A.2d 997, 1018 (Del. 1985).

²⁷ 548 U.S. 140, 149 (2006) (citing, *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993)).

neous deprivation of a defendant's choice of counsel is a "structural error" which requires no showing of prejudice and entitles the defendant to a reversal of his conviction. Nevertheless, the Court explained that its decision did not abrogate "a court's power to enforce rules or adhere to practices that determine which attorney may appear before it, or to make scheduling and other decisions that *effectively exclude a defendant's first choice of counsel*."²⁸ Moreover, the court expressly noted that its decision preserved "a trial court's *wide latitude* in balancing the right to counsel against the needs of fairness, and against the demands of its calendar."²⁹

(23) In assessing the reasonableness of the Superior Court's decision to deny a request for substitute counsel, we will examine whether there have been any previous complains about counsel, whether there had been a prior opportunity to obtain substitute counsel, and whether the request appeared to be a tactic for delay.³⁰ "There are no mechanical tests for deciding when a denial of a continuance is so arbi-

²⁸ Gonzalez-Lopez, 548 U.S. at 152

²⁹ Gonzalez-Lopez, 548 U.S. at 152 (citing, *Wheat v. U.S.* 153, 163-64 (1988); *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983)) (emphasis added).

³⁰ *Stevenson*, 709 A.2d at 631; *Riley* 496 A.2d at 1018.

trary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied."³¹ Furthermore, pertinent circumstances that the court should consider include the State's position, the rights of the moving defendant, the need for calendar control, as well as the efficient and effective administration of criminal justice.³²

31 679 A.2d 58, 64 (del. 1996) (quoting *Riley v. State*, 496 A.2d 997, 1018 n.27 (Del.1985); accord *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).

32 *Stevenson*, 709 A.2d at 630-31. We quoted the Third Circuit's position as follow:

Desirable as it is that a defendant obtain private counsel of his own choice, that goal must be weighed and balanced against an equally desirable public need for the efficient and effective administration of criminal justice. The calendar control of modern criminal court dockets, especially in metropolitan communities, is a sophisticated operation constantly buffeted by conflicting forces. The accused's rights-such as those relating to a speedy trial, to an adequate opportunity to prepare the defense, and to confront witnesses-are constantly in potential or real conflict with the prosecution's legitimate demands for some stability in the scheduling of cases. The availability of prosecution

(24) Here, there had been no previous complaint by Carletti regarding defense counsel. The court also had a significant interest in calendar control. By the time the defense moved for the admission of substitute counsel and a continuance on October 26, 2007, the trial, initially set for March 29, 2007, had already been postponed twice—once at the request of defense counsel and once at the request of the State. Carletti sought an additional continuance only eighteen days before the trial. Additionally, the case was one of the oldest cases on the Superior Court's criminal calendar. Thus, the court's interest in calendar control weighed heavily against the continuance.

(25) The State also had a significant interest in proceeding to trial as scheduled. Subpoenas had already been issued for that date and the State's expert witnesses were already scheduled. The alteration would also cause inconvenience to the

witnesses is often critically dependent on the predictability of the trial list. That delays and postponements only increase the reluctance of witnesses to appear in the court, especially in criminal matters, is a phenomenon which scarcely needs elucidation.

Id. (quoting *U.S. ex rel. Carey v. Rundle*, 409 F.2d 1210, 1214 (3rd Cir. 1969)).

witnesses and difficulty in rescheduling. Thus, the State's position weighed against the continuance.

(26) Finally, the interests of justice supported having the trial as scheduled. The case had already been protracted, with the request coming nearly four and a half years after the assault occurred in May 2003. Thus, the efficient and effective administration of justice weighed against the continuance. We conclude that the Superior Court's denial of Carletti's motion for a continuance was not an abuse of discretion.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry DuPont Ridgely
Justice

APPENDIX B – MOTION FOR CONTINUANCE

**IN SUPERIOR COURT OF THE STATE OF DE-
LAWARE**

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)

v.) I.D. #0609010043

ERNEST CARLETTI,)

Defendant)

MOTION TO CONTINUANCE

Ernest Carletti, Defendant, by and through Counsel, hereby move this Honorable Court to enter an Order rescheduling the trial date of November 13, 2007. The grounds thereof are as follows:

1. Mr. Carletti was arrested on September 15, 2006 in the State of Maryland on a Delaware Fugitive warrant. On September 18, 2006, he waived extradition and is detained in default of 355,000.00 bail.

2. Mr. Carletti retained Joseph A. Hurley, Esquire. A first case review was held on November 20, 2006.
3. Mr. Carletti filed a Motion to Dismiss Various Counts of the Indictment.
4. On December 26, 2006, the State filed a Motion for Rescheduling. Joseph A. Hurley, Esquire on behalf of the Defendant did not oppose the rescheduling of trial. The State requested a continuance as the alleged victim desired that her father be present during the trial and he was scheduled to be out of town the week of March 24, 2007.
5. On January 3, 2007, the Court entered an Order granting the State's unopposed Motion for Rescheduling. The Trial was subsequently scheduled for November 13, 2007.
6. The Court issued an opinion on March 16, 2007 granting in part and denying in part Defendant's Motion to Dismiss Counts of the Indictment.
7. By letter dated May 1, 2007, Mr. Hurley advised the Court that President Judge Vaughn scheduled the retrial in State v. Malinovskaya for September 4, 2007. Mr. Hurley indicated that a continuance request would be forthcoming. A continu

8. ance request was granted and the case was rescheduled to November 13, 2007.
9. On October 21, 2007, Defendant's mother, Geraldine Carletti formally retained Thomas Pavlinic, Esquire and the undersigned counsel (as local counsel) to represent Mr. Carletti.
10. Filed simultaneously with this Motion is a Motion for Pro Hac Vice Admission of Mr. Pavlinic and a Stipulation of Substitution of Counsel.
11. New counsel was retained by Defendant and his family due to an expressed dissatisfaction by Defendant and his family with current counsel. The new counsel was not retained for the purpose of delay.
12. Defendant understands that a continuance of the November 13, 2007 trial date is necessary in order for new counsel to effectively prepare for and represent Defendant at trial. Based on the seriousness of the charges and the necessity for investigation, counsel cannot adequately prepare for the trial in three weeks. (Exhibit A)
13. Defendant understands that this continuance request will be "charged" to the Defendant and expressly waives any speedy trial claim.
14. Donald Roberts, Esquire, on behalf of the State, does oppose this motion.

WHEREFORE, based on the foregoing, Defendant respectfully requests that this Court enter an Order granting Mr. Carletti request for a continuance of the November 13, 2007 trial date and scheduling a teleconference and/or office conference to select a new trial date convenient for the Court and all counsel.

Law Office of Jennifer Kate Aaronson

Jennifer Kate Aaronson, Esquire #3478
8 East 13th Street
P.O. Box 2865
Wilmington, DE 19805
(302) 655-4600
Attorney for Defendant

**IN THE SUPERIOR COURT OF THE
STATE OF DELAWARE**

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)

v.) I.D. #0609010043

ERNEST CARLETTI,)

Defendant.)

WAIVER

1. I am scheduled for trial on November 13, 2007 on charges of Rape first degree (two counts), Kidnappings first degree and Possession of a deadly weapon during the commission of a felony.

2. My attorney of record is Joseph A. Hurley, Esquire

3. On October 21, 2007, my family and I formally retained Thomas A. Pavlinic, Esquire, who

will be applying for Pro Hac Vice, and Jennifer Kate Aaronson, Esquire (local counsel) to represent me in this case.

4. I specifically understand that a continuance is necessary for Mr. Pavlinic and Ms. Aaronson to effectively represent me at trial.

5. I expected a continuance of my November 13, 2007 trial date due to Mr. Hurley's involvement in the trial of State of Malinovskaya. I received a copy of a letter Mr. Hurley sent to the Court dated May 1, 2007 in which Mr. Hurley indicated that a rescheduling of my trial date would be necessary due to the Malinovskaya trial.

6. I did not retain new counsel for the purpose of delay. Rather, I retained new counsel based on dissatisfaction with my current attorney.

Ernest Carletti

Date

**APPENDIX C – LETTER OF JUDGE JURDEN
DENYING MOTION FOR CONTINUANCE,
DATED OCTOBER 31, 2007**

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

JAN R. JURDEN

Judge

New Castle County Courthouse
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3722
Telephone (302) 255-0669

October 31, 2007

Via Facsimile

Donald R. Roberts, Esq.
Department of Justice
State Office Building
820 N. French Street
Wilmington, DE 19801

Via Facsimile

Joseph A. Hurley, Esq.
1215 N. King Street
Wilmington, DE 19801

**RE: State of Delaware v. Ernest Carletti
ID# 0609010043**

Dear Counsel:

I have reviewed the case law and counsel's arguments. The Court does not find sufficient good cause to continue the November 13, 2007 trial. The defendant's Motion for a Continuance is DENIED.

In light of the Court's decision, the Court will not sign the pending Pro Hac Vice motion and the \$300.00 fee should be refunded.

A pre-trial conference in this matter is scheduled for November 6, 2007 at 4:00 p.m.

IT IS SO ORDERED.

Very truly yours,

Jan R. Jurden
Judge

JRJ: mls

**APPENDIX D- OPINION OF TRIAL COURT
(J. JAN JURDEN)***

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

JAN R. JURDEN

Judge

New Castle County Courthouse
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3722
Telephone (302) 255-0669

Date Submitted: December 29, 2006

Date Decided: March 16, 2007

Donald R. Roberts, Esq.	Joseph A. Hurley, Esq.
Department of Justice	1215 N. King Street
State Office Building	Wilmington, DE 19801
820 N. French Street	
Wilmington, DE 19801	

RE: State of Delaware v. Ernest Carletti

* *Judge Jurden's Opinion did not address the issue raised herein.*

ID# 0609010043

*Upon Defendant's Motion to Dismiss
Counts of the Indictment-*

GRANTED in part and DENIED in part

Dear Counsel:

The Court has reviewed defendant's "Motion to Dismiss Counts of the Indictment" and the State's opposition thereto. For the reasons that follow, defendant's motion is GRANTED in part and DENIED in part.

The defendant is charged with six counts of Rape First Degree (Counts I-VI) and one count of Kidnaping First Degree (Count VII). Defendant argues that Counts I and II should be merged because "the factual underpinnings of the State's indictments represent, not two separate acts of rape, but rather one 'continuous act' constituting one count of rape."³³ "[W]hether a course of conduct permits prosecution for more than one statutory offense, of rape, ultimately turns on the facts, particularly the timing between the sexual acts and the physical movement of

³³ Def. Mot. to Dismiss, D.I. 5, § II.A.

the victim between the acts.”³⁴ At this point, the State’s proffer is “the victim believes that defendant may have left the room and returned with additional torture devices in between the times he placed his penis in her mouth.”³⁵ Because the determination is factually driven, and at this point the Court is unable to ascertain the timing between the sexual acts and the physical movement of victim between the acts, the Motion to Merge Counts I and II is DENIED without prejudice.

Defendant next argues that the presentment of Counts III, IV, IV, and VI violates the rule against multiplicity and constitutes “double-counting” which “runs afoul of due process of law.”

Count III alleges:

ERNEST CARLETTI, on or about the 22nd day of May, 2003 in the County of New Castle, State of Delaware, did intentionally engage in sexual intercourse with Kristen Baumer, without her consent and it occurred during the course of a felony, to wit: Kidnapping First Degree as incorporated in this Indictment as Count VII.

Count IV alleges:

³⁴ *Wyant v. State*, 519 A.2d 649, 661 (Del. 1986)(citing *Harrell v. State*, 277 N.W.2d 462, 469 (Wis. Ct. App. 1979)).

³⁵ State Resp., D.I. 9, at 3.

ERNEST CARLETTI, on or about the 22nd day of May, 2003 in the County of New Castle, State of Delaware, did intentionally engage in sexual intercourse with Kristen Baumer, without her consent and it occurred during the course of a felony, to wit:

Kidnapping First Degree as incorporated in this Indictment as Count VII.

Count V alleges:

ERNEST CARLETTI, on or about the 22nd day of May, 2003 in the County of New Castle, State of Delaware, did intentionally engage in sexual intercourse with Kristen Baumer, without her consent and during the commission he displayed what appeared to be a deadly weapon and represented by word and conduct that he was in possession or control of a deadly weapon or instrument.

Count VI alleges:

ERNEST CARLETTI, on or about the 22nd day of May, 2003 in the County of New Castle, State of Delaware, did intentionally engage in sexual intercourse with Kristen Baumer, without her consent and during the commission he displayed what appeared to be a deadly weapon and represented by word and conduct that he was in possession or control of a deadly weapon or instrument.

Delaware follows the Blockburger³⁶ test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment.³⁷ The test to determine whether there are two offenses or only one offense is "whether each provision requires proof of a fact which the other does not."³⁸ The State acknowledges Counts I-VI require proof of: (1) intent, (2) sexual intercourse, and (3) lack of consent by the victim. But the State argues that "the pairs of Counts all require proof of an element the others do not."³⁹ According to the State, the defendant committed two acts of intercourse.

In Counts I and II, the State charges the defendant with two acts of intercourse during which time the defendant caused physical injury in violation of 11 Del. C. § 773(a)(1). In Counts III and IV, the State charges the defendant with two acts of intercourse during which time the defendant displayed or represented he possessed a deadly weapon in violation of 11 Del. C. § 773(a)(3). In Counts V and VI, the State charges the defendant with two acts of intercourse during the commission of a felony (Kidnapping) in violation of 11 Del. C §773(a)(2)(a). The State argues

³⁶ *Blockburger v. U.S.*, 284 U.S. 299 (1932).

³⁷ *Burton v. State*, 426 A.2d 829, 836 (Del. 1981) (citing *Hunter v. State*, 420 A.2d 119, 125, 130-1 (Del. 1980)).

³⁸ *Id.*

³⁹ State Resp., D.I. 9, at 5.

that the defendant was properly charged with six counts of Rape First Degree, because each of the three difference types of Rape First Degree require proof of a fact that others do not: Counts I and II require physical injury, Counts III and IV require a deadly weapon; and Counts V and VI require kidnapping.

The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life and limb."⁴⁰ Double jeopardy protects individuals "(1) against successive prosecutions; (2) against multiple charges under separate statutes; and (3) against being charged multiple times and under the same statute"⁴¹ Multiplicity occurs when an individual is charged with more than one count of a single offense.⁴² Generally, "[d]ividing one offense into 'multiple counts of an indictment violates the double jeopardy provisions of the constitutions of the State of Delaware and of the United States.'"⁴³

⁴⁰ U.S. Const. amend. V.

⁴¹ *Williams v. State*, 796 A.2d 1281, 1285 (Del. 2002)(emphasis in original)(citing *Schiro v. Farley*, 510 U.S. 222 229-30 (1994); *Blockburger*, 284 U.S. 299; *United States v. Forman*, 180 F.3d 766, 769 (6th Cir. 1999)).

⁴² *Feddiman v. State*, 558 A.2d 278, 288 (Del.1989) (quoting *Harrell*, 277 N.W.2d at 464-65).

⁴³ *William*, 796 A.2d at 1285 (quoting *Feddiman*, 558 A.2d at 288).

As previously discussed, a defendant who commits multiple sexual assaults on the same victim may be convicted for "each separate and distinct act" under the same statute.⁴⁴ Courts have been willing to divide a course of conduct into separate acts, thereby allowing separate counts for each act.⁴⁵ However, courts have not dissected a statute, applied a single act to the subparts, and permitted multiple counts of the same statute based on one act.

In *Williams v. State*, the Delaware Supreme Court held that the defendant's conviction for two counts of possession with intent to deliver cocaine ("PWID") was multiplicitous and violated his constitution protection against double jeopardy.⁴⁶ The defendant was indicted on two counts of PWID based on two separate searches, in two different locations (defen-

⁴⁴ *Feddiman*, 558 A.2d 289 (quoting *Harrell*, 277 N.W.2d at 469, 471) ("One is not allowed to 'take advantage of the fact that he has already committed one sexual assault on the victim and thereby permitted to commit further assaults on the same person with no risk of further punishment for each assault committed. Each act is a further denigration of the victim's integrity and a further danger to the victim.'")

⁴⁵ *Id.* (holding that over the course of six hours, defendant committed eight counts of unlawful sexual intercourse; *Washington v. State*, 836 A.2d 485 (Del. 2004)(holding that defendant committed two counts of robbery when he robbed the victim of his silver chain and then a few minutes later, demanded the victim's car keys).

⁴⁶ 796 A.2d at 1283.

dant's car and home), which produced cocaine. Because the defendant was indicted on two counts of the same statute, the Williams Court distinguished the United States Supreme Court's decision in *Blockburger*, which "articulated the same-elements test to determine whether double jeopardy has been offended when a person is charged with violating two statutes as a result of one act."⁴⁷

The Williams Court adopted the Sixth Circuit's rationale in *Rashad v. Burt*, which focused on the defendant's intent, as well as the time and location of the act.⁴⁸ Because the defendant had one intended purpose for all of the cocaine, the Court held that he could only be charged with one count of PWID. The Court found this approach to be consistent with the ruling in *Feddiman*, which permitted multiple counts of sexual assault for each separate and distinct act, because for each of those acts, the defendant "formulated the intent to commit each assault and separately violated the same statute numerous times during one continuous attack of the victim."⁴⁹

In this case, the defendant's course of conduct can be separated into two separate acts of Rape First Degree, but those two acts cannot be further subdi-

⁴⁷ *Id.* at 1288 (citing *Feddiman*, 558 A.2d at 289).

⁴⁸ *Id.* at 1286-88 (citing *Rashad v. Burt*, 108 F.3d 677, 681 (6th cir. 1997)).

⁴⁹ *Id.* at 1288 (citing *Feddiman*, 558 A.2d at 289).

vided within the same statute to create four additional counts of Rape First Degree. Although defendant could have been indicted for Rape First Degree under any one of three different subsections of 11 Del. C. § 773, it does not follow that defendant should be indicted under every subsection for the same act. The defendant's Motion to Dismiss based on the multiplicity doctrine is GRANTED. Counts I and II, III and IV, and V and VI are merged, respectively.

The Court turns now to defendant's argument that the presentment of Count VII, which alleges Kidnapping First Degree, and Counts III and IV, which allege Rape First Degree based on the commission of Kidnapping First Degree, violate defendant's due process rights under Blockburger.

Count VII alleges:

ERNEST CARLETTI, on or about the 22nd day of May, 2003, in the County of New Castle, State of Delaware, did unlawfully restrain Kristen Baumer with the intent of violating and/or sexually abusing her and did not voluntarily release her unharmed prior to trial.

To obtain a conviction on Count VII the State must prove:

1. The defendant unlawfully restrained another person with any of the following purposes:

(a) To hold the victim for ransom or reward; or

(b) To use the victim as a shield or hostage; or

(c) To facilitate the commission of any felony or flight thereafter; or

(d) To inflict physical injury upon the victim, or to violate or abuse the victim sexually; or

(e) To terrorize the victim or a third person; or

(f) To take or entice any child less than 16 years of age from the custody of the child's parent, guardian or lawful custodian;

and

2. The defendant did not voluntarily release the victim alive, unharmed and in a safe place prior to trial.⁵⁰

⁵⁰ See Pattern Criminal Jury Instructions of the Superior Court of the State of Delaware ("Pattern Instruction"), § 13.d ("Kidnapping in the First Degree"); 11 *Del. c.* § 783A.

As used in the kidnapping statute, "Restraint" means:

- (1) substantial interference with another's liberty,
- (2) by movement or confinement,
- (3) without the consent of the victim

The Delaware Supreme Court has addressed this issue.⁵¹ A defendant may be convicted of kidnapping in conjunction with the underlying crime of rape if "the movement and/or restraint of the victim [is] more than incidental to the underlying crime."⁵² A separate kidnapping charge will not be submitted to a jury unless the trial judge determines, as a matter of law, that the evidence proves that the restraint was "much more' (substantial) interference with the victim's liberty than is ordinarily incident to the underlying crime."⁵³ Whether a defendant's conduct rises to the level of substantial interference is not measured by the "degree or duration of the movement and/or restraint, but whether the movement

⁵¹ *Burton*, 426 A.2d 829.

⁵² *Weber v. State*, 547 A.2d 948, 958 (Del. 1988) (citing *Burton*, 426 A.2d at 834).

⁵³ *Id.* at 959 (citing *Wilson v. State*, 500 A.2d 605, 609-10 (Del. Super. 1985)).

and/or restraint are incident to the underlying offense or are independent of the underlying offense.⁵⁴

At this state of the proceedings, the State's proffered facts support an independent count for Kidnapping First Degree. The State expects that the victim will testify that the defendant approached the victim on the street and forced her into his vehicle at gunpoint.⁵⁵ Once inside the vehicle, the defendant allegedly immediately restrained her hands and legs with handcuffs and leg shackles and placed duct tape over her eyes.⁵⁶ The defendant allegedly drove for approximately 25 minutes before stopping the vehicle. The defendant then allegedly removed the victim from the vehicle and walked and dragged her into a building.⁵⁷ Once inside the building, the defendant allegedly committed the acts of rape.⁵⁸ The defendant then placed a ball gag in the victim's mouth, placed a chain or weight around her neck, and lifted her from the ground by using a hoist attached to the handcuffs.⁵⁹

⁵⁴ *Id.* at 958 (emphasis in original).

⁵⁵ Aff. Probable Cause, dated Sept. 14, 2006.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

The defendant's movement of the victim from the street to his car and to another location was not incident to the subsequent acts of rape. The alleged movement and/or restraint of victim is sufficiently independent to support a conviction of kidnapping. Moreover, the defendant's alleged abduction of the victim at gunpoint, binding her hands and feet with handcuffs and shackles, and duct-taping of the eyes demonstrate much more interference with the victim's liberty that is ordinarily incident to rape. For that reason, defendant's motion to dismiss Count VII of the indictment is DENIED with prejudice.

IT IS SO ORDERED.

Jan R. Jurden
Judge

cc: Original - Prothonotary

IN THE SUPERIOR COURT OF THE STATE OF
DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE

V.

INDICTMENT

BY THE GRAND JURY

ERNEST CARLETTI

I.D. No. 060901004

The Grand Jury charges ERNEST CARLETTI with
the following offense:

COUNT I. A FELONY #N 06-09-1968

RAPE FIRST DEGREE, in violation of 11 Del. C.
Section 773 of the Delaware Code of 1974, as
amended.

ERNEST CARLETTI, on or about the 22nd day of
May, 2003 in the County of New Castle, State of De-
laware, did intentionally engage in sexual inter-
course with Kristen Baumer, without her consent
and during the commission of the crime he caused
physical injury to the victim.

COUNT II. A FELONY #N 06-09-1969

RAPE FIRST DEGREE, in violation of 11 Del. C. Section 773 of the Delaware code of 1974, as amended.

ERNEST CARLETTI, on or about the 22nd day of May, 2003 in the County of New Castle, State of Delaware, did intentionally engage in sexual intercourse with Kristen Baumer, without her consent and during the commission of the crime he caused physical injury to the victim.

COUNT III. A FELONY #N 06-09-1972

RAPE FIRST DEGREE, in violation of 11 Del. C. Section 773 of the Delaware code of 1974, as amended.

ERNEST CARLETTI, on or about the 22nd day of May, 2003 in the County of New Castle, State of Delaware, did intentionally engage in sexual intercourse with Kristen Baumer, without her consent and it occurred during the course of a felony, to wit: Kidnapping First Degree as incorporated in this Indictment as Count VII.

COUNT IV. A FELONY #N 06-09-1973

RAPE FIRST DEGREE, in violation of 11 Del. C. Section 773 of the Delaware code of 1974, as amended.

ERNEST CARLETTI, on or about the 22nd day of May, 2003 in the County of New Castle, State of Delaware, did intentionally engage in sexual intercourse with Kristen Baumer, without her consent and it occurred during the course of a felony, to wit Kidnapping First Degree as incorporated in this Indictment as Count VII.

COUNT V. A FELONY #N 06-09-1970

RAPE FIRST DEGREE, in violation of 11 Del. C. Section 773 of the Delaware code of 1974, as amended.

ERNEST CARLETTI, on or about the 22nd day of May, 2003 in the County of New Castle, State of Delaware, did intentionally engage in sexual intercourse with Kristen Baumer, without her consent and during the commission displayed what appeared to be a deadly weapon and represented by word and conduct that he was in possession or control of a deadly weapon or instrument.

COUNT VI. A FELONY #N 06-09-1971

RAPE FIRST DEGREE, in violation of 11 Del. C. Section 773 of the Delaware code of 1974, as amended.

ERNEST CARLETTI, on or about the 22nd day of May, 2003 in the County of New Castle, State of Delaware, did intentionally engage in sexual intercourse with Kristen Baumer, without her consent and during the commission displayed what appeared to be a deadly weapon and represented by word and conduct that he was in possession or control of a deadly weapon or instrument.

COUNT VII. A FELONY #N 06-09-1974

RAPE FIRST DEGREE, in violation of 11 Del. C. Section 773 of the Delaware code of 1974, as amended.

ERNEST CARLETTI, on or about the 22nd day of May, 2003 in the County of New Castle, State of Delaware, did unlawfully restrain Kristen Baumer with the intent of violating and/or sexually abusing her and did not voluntarily release her unharmed prior to trial.

COUNT VIII. A FELONY**#N 06-09-2319**

RAPE FIRST DEGREE, in violation of 11 Del. C. Section 773 of the Delaware code of 1974, as amended.

ERNEST CARLETTI, on or about the 22nd day of May, 2003 in the County of New Castle, State of Delaware, did knowingly possess a deadly weapon during the commission of a felony, to wit: Kidnapping First Degree, as set forth in Count VII of this Indictment which is herein incorporated by reference.

NATURE AND STAGE OF THE PROCEEDINGS

On September 18, 2006, the defendant, Ernest Carletti, was arrested and charged with six counts of Rape in the First Degree, one count of Kidnapping in the First degree, and one count of Possession of a deadly Weapon During the Commission of a Felony. (D.I. 1). On October 2, 2006, an indictment was returned. (D.I. 2). Prior to trial Carletti moved for dismissal of some of the charges. (D.I. 13; Ex. A to open. Brf.). On June 15, 2007, upon the State's request, the Superior Court ordered that the sexual assault charges would proceed on a "rape while kidnapped" theory. (D.I. 17). See DEL. CODE ANN. Tit. 11, 773 (a) (2) (a) (Supp. 2003).

The initial scheduling order, issued November 2, 2006, set a trial date of March 29, 2007. (D.I. 4). In early December 2006, a Superior Court judge was specially assigned to the case. (D.I. 6). On December 26, 2006, the State moved for a continuance: the victim wanted her father to be present during the trial to provide support, and prosecutors had learned that the victim's father was to be out of town the same week as the scheduled March 2007 trial date. (D.I. 8; B34). The request was granted on January 3, 2007 (D.I. 10), and at final case review on March 19, a new trial date of September 3, 2007 was set, but in May 2007, defense counsel moved for a continuance, having learned that a different Superior Court judge had set September 3 as the starting date for a first degree murder trial. (D.I. 15; b34.) That request was granted, and at an office conference on June 4, 2007, a trial date of November 13, 2007 was set. (D.I. 16). A scheduling order issued August 28 confirmed the November 13 trial date. (D.I. 23). There the matter stood until October 26 when another attorney moved to have a Maryland attorney admitted pro hac vice in the case and simultaneously moved for a continuance so that the Maryland attorney could prepare for trial. (B28-33). After hearing argument on the continuance requested, the trial judge denied the request. (B34).

On November 13, 2007, the case proceeded to trial. On November 18, 2007, the defendant was convicted of two counts of Rape in the First Degree and Kidnapping. Carletti filed a post-trial motion for judgment of acquittal again claiming that his convictions violated the multiplicity doctrine. (D.I. 58 & 59; B15-

24).⁶⁰ That motion was denied on January 17, 2008. (D.I. 65).

On January 31, the defendant was sentenced. Carletti filed a timely appeal and this is the State's answering brief on direct appeal.

⁶⁰ The defendant had actually filed his first post-trial motion for judgment of acquittal on November 26, 2007. In that filing he claimed that the evidence was insufficient, claiming a lack of corroboration or irreconcilable inconsistencies in the victim's reports to the police and her trial testimony. (D.I. 54; B7-14). It was through an amendment to that acquittal motion that he again raised his multiplicity claim. (D.I. 58 & 59; B15-24).

APPENDIX E - VERBATIM RECITAL OF
SIXTH (6TH) AMENDMENT TO THE UNITED
STATES CONSTITUTION

VERBATIM RECITAL OF SIXTH
AMENDMENT
TO THE UNITED STATES CONSTITUTION
prosecutions (Article [VI])

In all criminal, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX F- TRANSCRIPTS

(1)

IN THE SUPERIOR COURT OF THE STATE OF
DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)	I.D. NO. 0809010043
Plaintiff,)	
v.)	
ERNEST CARLETTI,)	
Defendant)	

BEFORE: HONORABLE JAN R. JURDEN, J.
APPEARANCES:

DONALD R. ROBERTS, ESQ.
Deputy Attorney General
For the State

JOSEPH A. HURLEY, ESQ.
JENNIFER KATE AARONSON, ESQ.
For the Defendant

MOTION TRANSCRIPT
OCTOBER 31, 2007

LUCILLE A. KELLY, CSR
SUPERIOR COURT OFFICIAL REPORTERS
500 N. King Street
Wilmington, Delaware 19801
(302) 255-0571

October 31, 2007
Courtroom No. 8E
10:04 a.m.

PRESENT:

As noted.

THE COURT: Ernest Carletti. Can we bring in Mr. Carletti. All right.

MR. ROBERTS: Good morning, your Honor.

THE COURT: Good morning.

MR. ROBERTS: Has the Court had an opportunity to review the filings?

THE COURT: Not as thoroughly as I would have liked.

MR. ROBERTS: Very well. Mr. Carletti is currently represented by Mr. Hurley. The crimes that were committed, that were alleged to have been committed by Mr. Carletti, occurred on May 22nd, 2003.

THE COURT: Do you know what, Mr. Roberts? Before you go any further, just for a clarity of the record, because I reviewed the docket sheet, and it wasn't clear in the docket, exactly which counts are we proceeding forward with, in light of

(3)

the Court's decision?

MR. ROBERTS: Well, that may be another issue all in and of itself, but as I recall—I don't remember the counts. I don't have my full file with me. It is the counts that allege rape during the commission of a kidnap.

MR. HURLEY: Counts I, II and VIII still remain.

MR. ROBERTS: Thank you.

THE COURT: Thank you.

MR. ROBERTS: The defendant was not an immediate suspect.

MR. HURLEY: Excuse me. I, II, VII and VIII.

THE COURT: Thank you.

MR. HURLEY: There's a kidnapping and a weapons offense and two rapes.

THE COURT: Thank you.

MR. HURLEY: You're welcome. Sorry.

MR. ROBERTS: He was finally indentified and arrest September 18, 2006, about 3-1/2 years after the offense. He was indicted on October 2nd, 2006, and in November the Court set forth a

(4)

scheduling order setting a trial date of March 29, 2007. In December the State learned that the victim's father was going to be on an out-of-town business trip that he could not reschedule. So three months before the scheduled trial date we asked for a new date, and the Court granted that.

THE COURT: When was that?

MR. ROBERTS: December 26th is when we found out. We filed for a new date, and the motion was not opposed. The Court granted that on January the 3rd, 2007, and a new trial date was set for September 3rd. On May the 3rd, four months before the trial date, Mr. Hurley found out that President Judge Vaughn had scheduled the—I can't pronounce it—Malinovskaya, the Russian murder case. He had scheduled that trial to begin on the date that our trial was to begin, so Mr. Hurley filed a request for a rescheduling four months before the trial date.

THE COURT: I recall that.

MR. ROBERTS: We then held an office conference with your Honor, and a new date was

(5)

agreed upon of November 13th, 2007. As I recall, the Court permitted time for us to insure that all our witnesses could be available. We did that. Two expert witnesses were made available and all that.

Last week Ms. Aaronson contacted me and indicated she intended to file for a substitution of counsel, a *pro hac vice* admission for Thomas Pavlinic. Did I pronounce that right, sir?

MR. PAVLINIC: Yes, sir. Thank you.

MR. ROBERTS: And a continuance of the November 13th trial date. That was filed 18 days before the trial, unlike the earlier motions. Subpoenas have already gone out. Today the case is, I believe, about 410 days old. It is one of the give oldest cases in New Castle County. But in the eyes of the victim the case is over four years old. She's lived in constant fear since then.

I cited to a couple of cases, Hicks vs. State, which stands for the proposition that unless it is based on clearly unreasonable or capricious grounds, a discretionary ruling on a motion for a continuance will not be disturbed by the Supreme

(6)

Court.

Additionally, the trial court, citing to *Briscoe v. State*, which is citing to a third circuit case, the trial court must first decide whether defendant's request for new counsel on the eve of trial is substantial enough to justify continuance of the trial in order to allow the defendant to obtain new counsel. If, after making the appropriate inquiries, the trial court determines that the defendant has not shown good cause for the late substitution of counsel, it may properly insist that the defendant choose between representation by existing counsel or proceeding pro se.

There also several other cases, *State v. Stevenson*, citing to a United States Supreme Court, dealing with trial courts having great latitude in denying or granting continuance requests, and that the defendant, if dissatisfied with counsel, is free to substitute counsel, but he needs to do so in a timely communication.

Also, based upon communications with Mr. Hurley, it was suggested in the defense motion

(7)

for a continuance that Mr. Hurley was not ready for trial. I can tell the Court that I have been in communication with Mr. Hurley continuously since the case was first brought into the system at the grand jury, including during the Malinovskaya murder trial. Mr. Hurley and I remained in communication. We have agreed and disagreed on different things, but have, I believe, set such a posture that everything could still go forward on November the 13th. And the State is very strongly opposed to a continuance.

And just for the record, I don't really care who represents Mr. Carletti. I just don't want the case continued.

THE COURT: Thank you.

Mr. Hurley

MR. HURLEY: Yes.

THE COURT: You are still counsel of record, are you not?

MR. HURLEY: I am. Your Honor, I have served on the State today a 3508 Motion which I have handed up to the court. I would just ask that it be marked. It doesn't have anything to do with

this, except I'm going to refer to it. There are three factors that I suggest the Court should—by the way, the reason that my client and I are sitting so far from each other is not because, from my point of view, of antagonism. I asked him to sit there because I feel horrible, and I don't want him to catch anything.

There are three factors that I suggest that the Court should consider. And, unfortunately, the case law typically comes into play, I think, where there is a public defender that represents a client, and a defendant decides that he doesn't like the deal that's been given to him about a week or two weeks before trial, and then decides he's going to jump to another attorney.

And then the Supreme Court typically reviews simply the objective factor, and that is can the defendant get reasonably competent counsel. And if the answer is yes, then the orderly process of the court proceeding super cedes any other consideration. I submit that that is a narrow view and that there are three factors that should be considered: One being the objective, secondly

Being the subjective, and third being judicial economy.

Dealing with the objective, to the extent that anyone made a representation regarding my readiness, that is totally inappropriate. It's none of their damn business, if anybody said that.

THE COURT: Where did that appear?

MR. ROBERTS: In the- Ms. Aaronson's filing, I'll find it exactly. It might have been in an affidavit, actually. In a waiver signed by Mr. Carletti.

THE COURT: I see it, yes. Thank you. Sorry to interrupt you.

MR. HURLEY: So that is totally extraneous to this, would have been inaccurate, and is inappropriate to somebody who puts themselves in a presumptuous position to comment upon anything to do with my practice of law and in this particular case. As a practical matter, as we speak, typically in a— and I'm going to get to my bottom line. My bottom line is that I agree that he should have a new attorney. So it's going to start out like I'm disagreeing, but I agree for a lot—

(10)

THE COURT: You do agree he should have a different attorney?

MR. HURLEY: Yes. Objectively speaking, when I have a major case, I go through it for to six times. At this point since I got out of the Russian case last week, I have spent 20 to 30 hours solely on this case. And that includes doing some things that should have been done before, which were to file motions to suppress evidence. And I find out this morning Mr. Roberts agrees that the motion should be granted. It also is to—was to research the jurisdictional issue of a crime beginning in Delaware and continuing into Maryland, which I have now researched. It also includes the 3508 motion which has now been filed seeking to get into the sexual history of the complaining witness. I have reviewed the file material three times at this point in time.

What has not been done at this point in time, and remains to be done, and there is sufficient time to do it, is to review all of the evidence in this case. And arrangements are being made, if I'm still in the case, to do that within

(11)

the next several days. Mr. Roberts has approved that, and we're making communications with the police officer, and to visit the initial crime scene.

Other than that, between now and the 13th I would be devoting myself almost entirely to this, and I would expect to put in another 15 to 30 to 40 hours dealing with this case, and this case alone, because this is a "six coat of paint" case.

So the point is that if I were called upon to try the case today, I could try it today at a C minus level. If I were called upon to try it on the 13th, I would, using my humility, at least give a workmanlike performance. So the fact is objectively I could be prepared.

On the other hand, saying what I have just said now, it is quite clear that if new counsel gets involved in the case, he could not possibly be adequately prepared, unless he stops everything that he is doing, and 10 or 12 hours a day for the next—so from now until the 13th, traveling back and forth, meeting with the defendant, meeting the evidence, meeting with the defendant. As a

practical matter, an attorney cannot reasonably be prepared to start at ground zero and do this. And even though I've done what I've done with regard to my work product, each person would do it their own particular way, and I don't think that would be particularly helpful.

The subjective, which is overlooked often. Mr. Carletti is a person who is a worrier. He is a prolific writer, and he has written me, I would suggest, 20 to 30 missives that I came across when I started my review of the case which have come into the office unanswered. I try to put myself in the position of another person in life, and particularly my professional life, as well. And I put myself in Mr. Carletti's place, and I'm facing the rest of my life in prison. I know that my attorney is involved in a major case. I know that I have written him letter after letter after letter. His bedside manner is atrocious because he has not responded to any of the letters in the past couple of months. In the beginning I did, but I have not in the past couple of months because—well, because I was busy, and some of his letters

(13)

really don't require attention to the extent that other than simply being cosmetic. But some of them do.

For example, he asked about character witnesses. I know as an attorney character witnesses is absurd. There is four or five bombs out there, 404 material, that would blow him away in front of a jury. There is no way in this world that a single character witness would be called. However, I have not explained that to him. So he writes me a letter, and we're not getting within three weeks of the trial date, and he's asked me about character witnesses, and he's sitting there wondering what's going on, what's going on, what's going on. Joe Hurley knows we ain't calling character witnesses. Ernie Carletti has no idea, and as he sits there, he has the perception that this attorney is not on the bail, is not at the helm, time is running out, time is running out.

In addition to that, I have reason to believe that there was another—in the past ten years I probably have lost one sex case that I can recall, and that was a good one, a 50-year job.

(14)

And I suspect that Mr. Carletti is aware of that person because that person coincidentally has engaged the same Annapolis, Maryland, attorney that Mr. Carletti now seeks. So I would assume that there is some connection there, although who knows. And added to the anxiety he's already experiencing, if I am correct in my assumption, he now sees somebody who's just had the same attorney who's taken a bullet next to him, and now he's coming up with not being prepared.

There was a new indictment that was issued. I have not dealt with that at all because of my participation in the Russian girl trial, and because that is on a back burner, because it's not going to come up until after this, anyhow. And depending on the outcome of this, it may be moot, it may be not. But the point is that I have not even discussed with him the statute of limitations aspect. I'm sure he's wondering how can they ten years later bring an indictment for something that happened that long ago.

So the point that I am making is that, although I know that when the bell rings, I will be

as ready as anybody can be, he is sitting there in a state of agony not knowing what I know, and having every reason to believe that his life is going down the tubes because his attorney is too busy in other matters to take care of his interests.

There is a certain rhythm that the Supreme Court typically ignores – or not – there is a certain rhythm that some courts in other states typically ignore when considering the idea of confidence in an attorney. If I go into a case and I know I have a client who is gun shy because he thinks I'm not going my job, my performance is affected because I'm going to start doing things that I ordinarily wouldn't do. I filed a motion to suppress evidence there that I really at the end of the day, practically speaking, don't make a bit of difference. But if I didn't file it, I'm going to have a client say why didn't you file that motion. So I start doing things that distract from the things that are at hand in order to make a cosmetic record to protect myself under Rule 61 when I should be focusing on things at hand.

(16)

There is a natural interplay we know from life when somebody says that don't want you. As much as you try to put that aside, is the relationship the same? Probably not. Mr. Carletti has said, Joe, I don't want you. I reject you. I want to dump you. And if the court says, Oh, no, you've got to stick with him, we have a divorce petition that's been filed that's been rejected. And two people are forced to, quote, live, close, quote, together, and the stakes of the outcome of that, he spends the rest of his life in prison, and that's not right.

Thirdly, with regard to judicial economy, if the Court does not grant this particular request—and I will point out three years of the four years has nothing to do with the judicial system. This isn't where it's been in the judicial system for four years. The arrest occurred on September 15th, 2006 so we're 13, 14 months, 13 months out, and 12 months from a trial date in terms of the judicial system.

But as a practical matter, I tried to protect Mrs. Carletti, his mother, from herself and

giving away her life savings from the very beginning. I'm the bad guy now. She didn't look at me when she came in. But I know her personality enough to know that if he is forced to go forward with me, if there's some attorney out there in the future for Rule 61, and there is a one in one trillion chance that somehow that will change things, she'll go mortgage the house, and we'll have a Rule 61, down the pike.

So in terms of judicial economy, it is better to continue this case two months, have it done right to Mr. Carletti's satisfaction, remove all Rule 61 stain, have a clean record, and the case will be promoted in terms of judicial economy far better than having this fractured situation that we're going to have now. This case will be around three years from now. So for all of those reasons, I am in complete agreement with the request.

THE COURT: Thank you.

MR. ROBERTS: May I just correct one thing?

THE COURT: Certainly.

MR. ROBERTS: Mr. Hurley suggested that the

State felt that the motion to suppress should be granted. That's not exactly—I understand where that came from, but that's not exactly correct. The State's position is that we're not going to introduce anything from the house, and therefore the motion is moot.

THE COURT: I have not seen the motion yet.

MR. HURLEY: It was faxed to you yesterday.

MR. ROBERTS: As is the practice of many defense attorneys, you have a tendency to get bombarded with 20 of them, I think to distract you, right before the trial, including the one I just got this morning. But that's not Mr. Hurley's—he's not the only one that frequently does that.

THE COURT: Ms. Aaronson.

MS AARONSON: Good morning, your Honor.

THE COURT: Good morning.

MS. AARONSON: I was contacted by Thomas Pavlinic who is present in the courtroom about the possibility of local counsel and sponsoring a motion for pro hac vice. I filed the continuance request for the pro hac vice motion, a formal motion for continuance, based on the Court's

typical practice not to grant extensions or continuances on short notice.

Mr. Pavlinic has focused on his defense practice over the last give to seven years on sex cases. He was contacted by Mrs. Carletti initially. He was formally retained on October 21st. He's present in the courtroom to answer any of the Court's questions. He has practiced. He's been admitted pro hac on one occasion here in Delaware.

THE COURT: What case?

MS. AARONSON: It was a Kent County case, and if I may, your Honor. State vs. Burgess, and it was Laura Yiengst.

MR. PAVLINIC: You're Honor, for the record, Thomas Pavlinic. It was a case that ultimately was dismissed based upon a flaw in the indictment. That was in Dover. My sponsoring attorney was Laura Yiengst.

THE COURT: Come up forward. Who was the judge?

MR. PAVLINIC: Your Honor, I don't remember because it was done at a call of the docket where

The case was part of a massive docket call, and there was no true bill that was returned. And, so, we appeared or what was going to be an arraignment, and the arraignment turned out to be a dismissal. So my appearance was entered preliminarily, but the case never went to trial.

THE COURT: All right. Let me ask you a couple of questions.

MR. PAVLINIC: Yes, ma'am.

THE COURT: If, and this is a huge if, in light of my concerns about many things with regard to continuing this trial. If I continued the trial, how much time would you like, and how much time would you actually need?

MR. PAVLINIC: You're Honor, I think there was a reference to 60 days, either probably sometime in January, if that would work. We have a date in December that would work for us, but if the Court grants the request, there are certain things I can move, and I'd be happy to do that to accommodate the Court.

Both Mr. Roberts and Mr. Hurley have made

gracious comments. There's no friction between either of them, and I was appreciative of Mr. Hurley's comments. I was just retained in the case. Sometimes different styles impact a client in a different way. And, so, whatever the Court thinks would be appropriate. We could maybe work out and hammer out some days, and there may be things that I could be able to change. But if we could move the case sometime in January. I don't know what the Court's docket is here in your county with regard to Christmas, the week before Christmas, but we're available on that date, both Ms. Aaronson and I.

THE COURT: Is it a protracted trial? It's my understanding it wouldn't take that many days.

MR. PAVLINIC: I use the term "protracted" not perhaps in terms of—probably it was an unartful word. The consequences are very severe. They're very serious charges, and we look at them as very serious charges, and we just need proper time to prepare and to go over all the ground that

has to be gone over.

MR. HURLEY: Given the voir dire that I have prepared with the particular sexual issues, I would expect a full day with jurors, and sadomasochism, and bondage, and things like that. So it's probably a four-day proceeding from jury selection to charging the jury.

THE COURT: Mr. Roberts.

MR. ROBERTS: Your Honor, in addition to just the time factor, how old this case is, every time we push it back, it prejudices the State. It's -- the victim has been through absolute living hell, and the more time passes, the more her memory fades. Witness availability always becomes an issue. After four years, you know, people start retiring from agencies. Our DNA analyst, we had to track her down. She's not longer here. Mr. Hurley has been kind enough to, I think, work out something along those lines because the DNA is not really an issue in terms of the defendant anyway. But it's just increasing the prejudice to the State.

THE COURT: I understand. I guess my

question to you is if I was to grant a short continuance, my concern is with the Christmas and Hanukkah coming up, and I don't know if your client's of a religious persuasion or celebrates those holidays, but I don't want this hanging over her head before or after. So I'm in a quandary.

I do recognize the practicalities articulated by Mr. Hurley and the problems we could have down the road, if I don't grant the continuance. I recognize the impact on the victim. I'm certainly not in her shoes, but I can understand how awful that would be. But I also understand there are some pretty serious constitutional rights at issue here, as well, for the defendant.

MR. ROBERTS: But the constitutional rights at issue are not the subject of issues that Mr. Hurley spoke about. While I wholeheartedly agree with Mr. Hurley and with what Mr. Pavlinic has indicated, that's not a constitutional issue. He has capable counsel. Mr. Hurley, it's not like he's ignored the case. Perhaps he ignored Mr. Carletti. That's between them. But it's not

like Mr. Hurley hasn't worked on this case.

THE COURT: I understand. Anything further?

MS. AARONSON: No, your Honor.

THE COURT: If I was to grant a continuance, what does your calendar look like in December?

MR. ROBERTS: Your Honor, my calendar is horrible in December. I think I've already for four trials scheduled for December 17th, which was the date that was suggested.

THE COURT: What about the week before?

MR. ROBERTS: I'm sorry?

THE COURT: What about the week before?

MR. ROBERTS: Well, I've also got the issue I've got to track down all my witnesses again and make sure they're available, in the country, and locally, and all that type of thing. So to commit to a date would be difficult, particularly when we're talking about prior, just prior to the holidays when people often travel and things along those lines.

If the Court's going to grant a continuance, I'm going to ask that it be after the first of the year. Not that I'm suggesting or agreeing that it

should be moved. But if that's the case, I'd rather get the holidays out of the way. You know, it's unfortunate that this is going to hang over the victim during that time, but it's been long already for her. Again, the subjectivity, I understand, but I believe that that should be set aside.

THE COURT: All right. Anything further?

MR. PAVLINIC: Your Honor, if I may, just one comment. In speaking with Mr. Carletti, he's been incarcerated for now 13 months, and there would be no insensitive for him to try to move the trial, continue his incarceration for any purpose of delay. And he understands that he may have to be incarcerated pending this trial for another couple of months, perhaps until after the first of the year. He has agreed to that and is prepared to acquiesce to that on the record.

So while we have understanding and sympathy for everybody that's involved, he also stands constitutionally innocent, and he's been incarcerated for 13 months. And I think that's a big consideration to show his sincerity in wanting

to continue this not for any inappropriate reason.

THE COURT: Have you made any efforts to ascertain the availability of your witnesses in December or January, should a continuance be granted?

MR. PAVLINIC: Many of our—two of our witnesses are here, your Honor, in the courtroom. There are other things that have to do with regard to things that I may have to research in Elkton, in Maryland. But really, we, Mr. Carletti and I, only met one time. And when I tried to go back to see him the second time at Gander Hill, I was not permitted entrance because they said that I wasn't admitted pro hac vice. When I tried to explain to them that I was still in the investigatory stages, I wind up calling Mr. Danberg's office, and then he referred me to Aaron Goldstein. And he's the attorney general. And, so, I wrote—dictated a letter yesterday, and Mr. Goldstein said that that was a wrong policy at Gander Hill and that out-of-state attorneys could get in. So our witnesses that we would have, would be fact witnesses, would be available at any time because

They're willing to accommodate and try to help Mr. Carletti.

THE COURT: If I didn't move the trial date and kept the trial as is, are going to want to be admitted *pro hac vice*?

MR. PAVLINIC: I couldn't, your Honor. I've made that clear to both Mr. Carletti and his mom. I just wouldn't—it would be ineffective. Mr. Hurley would be the best horse for that race because he's been in the case. I just couldn't possibly prepare. I've only known of the Carlettis for three weeks, and I've only met him on the first time on the 17th. Ms. Aaronson was contacted, and we met Mrs. Carletti immediately, so we couldn't – I wouldn't want to be admitted. That's been clear to my clients, and it just wouldn't be—I wouldn't be able to be effective, so—I think that applies to Ms. Aaronson, also.

MR. ROBERTS: Your Honor, the case of *Briscoe v. State*, which is 606 A.2d 103, suggests that the Court should make inquiries of the defendant for good cause for substitution of

counsel which would then give the Court a reason to reschedule the case. So far all I'm hearing is, you know, Mr. Hurley didn't return some letters.

THE COURT: Are you suggesting the defendant should address the Court?

MR. ROBERTS: I am. To make the record complete.

THE COURT: What's your position on that?

MR. HURLEY: I THINK IT'S THAT Court's discretion, if that's something that you think is important for you to consider. He's not going to talk about merits of the case. And before you say that, two things. It's kind of specious to say further delays will impair memory. After four years, another two months don't do a whole lot. Secondly, it's also kind of hollow to say this has been hanging over her head, when they've requested a continuance before. If you want to address him, that's fine.

THE COURT: I will in just a second.

MR. ROBERTS: The State's request for a continuance was almost a year ago. The issue of memory state as time passes, you know, at that

point I didn't know—I was not aware that the Court was looking at a month or two months. I thought it was going to be just put back into the track, which means about six months from now. So—

THE COURT: I understand

MR. ROBERTS: Thank you.

THE COURT: Mr. Carletti, do you want to address?

THE DEFENDANT: If I may, you're Honor. Your Honor, like I said, I have no problems with Mr. Hurley. I mean, I have the utmost respect for him. He is right. I am a worrisome person. This is my life. Before this I was a very productive member of the community. I taught almost a hundred students a week for the past 15 years of all ages, very highly respected in the community. I have a website that—

THE COURT: Okay. Let me stop you.

THE DEFENDANT: I'm sorry.

THE COURT: Because what I'm concerned about is did Mr. Hurley accurately state your reservations?

THE DEFENDANT: In the beginning, yes. I haven't seen Mr. Hurley for approximately ten months.

THE COURT: Why do you want to switch counsel this close to trial?

THE DEFENDANT: There's been a lot of things that I have learned through being incarcerated now, that I've never been in this situation before, that I have learned that need to be addressed, like witness preparation, things that were not answered back for me through letters, which is correct, phone calls that were not accepted, postponements that were made before. As Mr. Roberts said, the original case, which I was ready for, was postponed six months, which was September 5th, I'd like to get this over with.

THE COURT: If you were ready for the original case, why aren't you ready now?

THE DEFENDANT: Well, because, like I said, it's been so long since I seen Mr. Hurley. In the beginning I saw him a few times, three times to be exact. It's been ten months, and things that I'm learning now are developing that need to be

addressed. Like I said, witness preparation.

THE COURT: Why can't he do that?

THE DEFENDANT: As Mr. Pavlinic said, It's a very short time now to do so. And I know that nobody has been contacted as of yet. With a couple extra months, I'm hoping that everything could be a little bit more prepared. I just don't want to go into any situation like this unprepared and lose my life for something that was accused of. I've been in here incarcerated for almost 14 months, and I'm trying not to get too much into the facts of the actually case and things like that, but that is not in my nature, nor my heart, to do something like that. So I just want the best possible preparation to go on with it. And it's nothing against Mr. Hurley. He has a great track record. He's a fantastic lawyer. I just feel that the need for different counsel at this point is in my best interest.

THE COURT: All right. Thank you.

THE DEFENDANT: Thank you, your Honor.

THE COURT: Anything further?

MR. ROBERTS: Your Honor, just that good

cause has to be shown, according to Briscoe and I don't believe that that's the case here.

THE COURT: All right. I'm going to review the case law and take a look at the file. I'll issue a decision very quickly. Thank you.

(The proceedings concluded at 10:40 a.m.)

STATE OF DELAWARE:

NEW CASTLE COUNTY:

I, Lucille A. Kelly, official Court Reporter of the Superior Court, State of Delaware, do hereby certify that the foregoing is an accurate transcript of the proceedings had, as reported by me in the Superior Court of the State of Delaware, in and for New Castle County, in the case therein stated, as the same remains of record in the Office of the Prothonotary at Wilmington, Delaware, and that I am neither counsel nor kin to any party or participant in said action nor interested in the outcome thereof.

This certification shall be considered null and void if this transcript is disassembled in any manner by any party without authorization of the signatory below.

WITNESS my hand this _____ day of _____, 2007.

Lucille A. Kelly, CSR
Delaware CSR No. 248-RPR
Expiration Date: January 31, 2008

IN THE SUPERIOR COURT OF THE STATE OF
DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE

v.

Crim. ID No. 0609010043

ERNEST CARLETTI,
Defendant.

BEFORE: THE HONORABLE JAN R. JURDEN,
And a Jury

APPEARANCE:

DONALD R. ROBERTS, ESQ.
DELAWARE DEPARTMENT OF JUSTICE
Deputy Attorney General
for the state of Delaware

JOSEPH A. HURLEY, ESQ.
Attorney for defendant Ernest Carletti

NOVEMBER 16, 2007
JURY TRIAL PROCEEDINGS

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(2)

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November 16, 2007
Courtroom No. 6D
9:27 a.m.

PRESENT:

As Noted.

THE COURT: Good Morning.

MR. HURLEY: Good morning. Several housekeeping matters, I guess you'd call them.

Number one, I found the instruction on multiple crimes that I had told you was James. In fact, it's Pierce. And I don't know that it's any different, I really haven't checked. But I unstapled it, I had the charge—do you have it up in front of you? No. She's going to hand it to you. I took the staple out.

THE COURT: Oh, okay.

MR. HURLEY: So you have no difficulty with it. So whenever, I don't think there's much different.

Secondly, there is an Officer Miller who is working midnights, and Mr. Roberts has consented to interrupting the flow of Detective Rieger and calling this witness as a 3507 witness so he can go.

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MR. ROBERTS: I think we need to let the jury know that we're doing that so they understand the switch from Mr. Hurley being required to do direct.

MR. HURLEY: Thirdly, after Scott Rieger concludes his testimony, I'm going to ask that we take a recess. And the reason is this: He has made a statement yesterday regarding the context of "I wouldn't do that." I've located it on the tape, and I think if I refresh his recollection with the context, he may, it will refresh his recollection. And there's another passage that I want him to look at, sort of like refreshing recollection, ordinarily you hand it up and the jury wouldn't know about it, I can't do it in front of the jury. So I just want him to have the ability to listen to these excerpts. I'm assuming we have the technology?

MR. ROBERTS: We have to listen to the entire thing.

MR. HURLEY: We can't fast-forward it?

MR. ROBERTS: Let me look at the equipment. We can try.

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Given where we are in the day, and that it's been a whole week, you've been very patient, we are going to proceed with that first thing Monday morning. We will close and charge on Monday morning, and then the case will be yours to deliberate then. You should not under any circumstances discuss anything about the case with anyone over the weekend. All right, It's not the time or place. And it wouldn't be a violation of your sworn duty to do so. I don't know whether there will be any press coverage over the weekend, but you should avoid, as you have been all along, any media accounts, any media coverage of the events. Do you understand?

THE JURY: Yes.

THE COURT: Are there any questions?

THE JURY: No.

THE COURT: All right. We'll begin promptly at 9 a.m. on Monday. Have a wonderful weekend. You can leave your notebooks on your chair. Thank you.

(Jury leaves the courtroom at 2:28 p.m.)

THE COURT: Mr. Hurley.

MR. HURLEY: Yes. We need to develop a record. When we met in chambers to discuss jury

instructions, I did not ask that it be recorded, and we had a meeting. During the course of the meeting the Court remarked in looking at me that I had, I don't know what the word, crushed, defeated, whatever, some kind of look on my face, which I did. Immediately prior to that look Mr. Roberts announced we're going on—there was some discussion about Counts I and II being the inappropriate counts. And the Court in submitting its prototype for the instructions had adopted the language, its language of Counts I and II, which was causing physical injury.

I was pointing out, or Mr. Roberts, somebody was pointing out, no, those are the wrong counts. At that point in time Mr. Roberts indicated it was the kidnapping counts. And the look that I had was, oh, whatever, because I had been preparing the case on the basis of Counts V and VII, which were the weapons count. The look that you saw was my response to that, did I screw this up, and in my own mind thinking what I would have done differently.

We then had a discussion and it turned out and I guess we'll have this as a part of the record,

Mr. Roberts had made an error in his nomenclature in terms of numbering when he notified the Court, after you had dismissed multiple counts of the indictment, and you had arbitrarily for the purpose of the discussion said that Counts I and II remain.

The state then wrote a letter to you and copied me and indicated that it was the State's choosing as to what they wanted to go forward on. And in the course of that indicated that he was asking that Counts V and VI remain, and counts, whatever the other counts are, I, II, III, IV, whatever, be dismissed.

As we now look at the letter, he made specific reference to the kidnapping. When I looked at the letter I didn't get out my indictment, get his letter, and say now is this really the kidnapping? I looked at V and VI and I relied upon that.

I indicated to the Court that I wanted some time to think about it. And obviously this is not my making up something, because not that I would anyhow, but the look on my face that all falls on how surprised I was.

As I thought about it over the luncheon

recess, it's sort of a mixed bag. On the one hand, if I had known that the State's theory was Counts III and IV, and that those counts lived, I don't believe my opening statement would have been any different, I don't believe that a single question of any witness that I called would have been different, nor do I believe I would have offered any evidence. That's the good news, any different evidence. The bad news is I would have counseled my client differently.

MR. ROBERTS: I'm sorry?

MR. HURLEY: I would have counseled my client differently with regard to his decision whether or not to testify. Because I would have told him what he's walking into if he gets up there and reinforces the kidnapping, a 30 year. And I can tell you without any doubt in mind, this, it's up to you type situation, I would have thrown another huge wrinkle in the case. So there is definitive definite prejudice.

I don't think my client's performance on the stand because of one question and answer, just putting aside everything else, was stellar. Had I to

do it all over again and could see the future and saw what happened with regard to one of his answers, I would have said don't testify. And I can tell you very definitely there is a reasonable change he may not have testified had I known that III and IV were to be the ones that lived.

Now, the question is, Mr. Roberts can say, well, we told you kidnapping, and I can say that you said V and VI, who bears the burden when the misinformation gets out? I relied upon it reasonably, and my client has relied upon me to give him proper advice, my ability to do so has been severely compromised. So I ask that the Court vacate its order V and VI remain.

MR. ROBERTS: Your Honor, while I did miss such a word, mistype which counts were being dismissed, I made it clear that the State would prefer to go forward under the, quote, Rape while kidnap theory which is charged in Counts V and VI. I don't know that Mr. Hurley would have, could have done anything differently assuming he felt that we were going under the rape while kidnap theory.

Mr. Hurley has presented, it seems to me, his defense

based upon the weapon charge and based upon the kidnap charge, or the injuries side of the aspect. And he requested his lesser included based upon that. I can't see where anything would fall differently. In terms of counseling his client, I don't know what went on in the record, on the record in here. I don't know what advice, if any, Mr. Hurley gave his client regarding testifying, but, quite frankly, I Can't see where anything would shake out differently.

You can't read this letter and ignore the fact that the words "rape while kidnap theory" which is charged are in there. And had I written the letter and simply said, not had the sentence in there, I think we would be in a far different place. But clearly this is not much more than a clerical error. But the rape while kidnap is in quotation marks. The letter is not that long so as to be confusing. And certainly Mr. Hurley was not confused by the length of the letter.

But I think that the case has been defended under all theories—no injuries, no rape, no weapon, the three that we've started with in the

beginning when the multiplicity argument first came up. So I don't know where – again, the Court's privy to what Mr. Hurley has told his client, but I'm not, so it makes it difficult for me to respond to that side of it.

THE COURT: All right. I have a few comments. The Court has operated under the understanding since the time of Mr. Roberts' June 2000 letter—2007 letter that the prosecution for rape would be based on rape while kidnapping. I was, I was always under that understanding. I too had the counts confused based on Mr. Roberts' letter.

I understand what Mr. Hurley's saying, but it remains a fact in the case that at no point was that count number confused on the straight kidnapping. So kidnapping has always been in the case and has been kidnapping first degree. SO to the extent that Mr. Hurley says he may have counseled his client differently, before his client took the stand they must have had a conversation about the elements of kidnapping.

I remember the October 31st conference we had, I don't remember whether it was live or over the

telephone, but I distinctly remember that the State again reiterated its theory of the case that the rapes would be premised on rape while kidnapping. I do agree there was confusion over the count numbers, and there is no question that Mr. Roberts

Letter has an error in the count numbers, it said Counts V and VI, and it should have said Counts III and IV because those are the corresponding counts to rape while kidnapping.

Having said all that, I am going to let my order stand over Mr. Hurley's objection. I'm going to vacate the "so ordered" line on Mr. Roberts' letter, and my order reinstated Counts III and IV. And the jury instructions were prepared based on Counts III and IV, which I believe is consistent with at least the Court's and Mr. Roberts' understanding moving forward as we've approached trial and consistent with the evidence put on.

So that's where we are.

MR. HURLEY: I need to comment, I need to reference to something. He was prepared to go on the sword on two to 25. Yeah, we discussed the kidnapping. And we discussed it in terms of you're

probably going to get convicted of that, and you're facing a two-year mandatory, but you're avoiding a 30 year mandatory.

So analytically that puts us either, number one, the State should be held accountable for its error which was relied upon in good faith and reasonably by counsel. Or, two, defense counsel was not reasonable in relying upon that because he didn't see kidnapping, in which case I move for a mistrial under Rule 61. It's one or the other. He's paying the price. It's either their fault, my fault, or both fault, and he's paying the price, because he would have gotten different counseling.

THE COURT: On a Rule 61, he would have had to have satisfied both prongs of Strickland, and given the evidence, I don't know whether he could satisfy both prongs of Strickland.

MR. HURLEY: And one of them is that the conduct is – and it would have made a difference in the outcome?

THE COURT: We don't know.

MR. HURLEY: Well, we'll never know because we'll never know what the advice would have been.

But that means, then, that if I gave him the worst advice in the world, because we say we don't know, that's not, that's not a logical, reasonable conclusion.

THE COURT: Well, I don't think it's appropriate for me to engage in analysis of how to avoid Rule 61 at this point. I think what I need to focus on is the Court read Mr. Roberts' letter. I did not get a copy of the indictment when I wrote "so ordered." I relied on kidnapping while—or rape while kidnapping, that's what I relied upon. I didn't go back and make sure the counts were right. And nobody did, not until we went through the jury instructions and my secretary pulled Counts V and VI and not III and IV. So—or I and II whatever it was. Nobody, nobody went and looked at the count numbers.

But we did get a letter from Mr. Roberts saying I'm proceeding under this theory. I understood he was proceeding under that theory. That is consistent with the evidence he put on at trial and with his opening statement, I believe. I didn't go back and check his opening statement, but don't

(99)

you refer to that in your opening?

MR. ROBERTS: I did. I talked about the elements of the offense of kidnapping and the elements of the offense of rape.

THE COURT: While Kidnap?

MR. ROBERTS: Yes.

THE COURT: So at a minimum the defendant was on notice as of the start of the trial of Mr. Roberts' opening statement, and at that point somebody should have said, hey, wait a minute, I thought we were going on physical injury, not on rape while kidnap, and nobody did that, So.

MR. HURLEY: All right. Could we have his letter marked as a Court exhibit for the purposes of this case so it's isolated with this record as opposed to just being part of the file?

THE COURT: Sure. It's docket item No. 17. It's up in my office, but will be in.

MR. HURLEY: Okay, Thank you.

THE COURT: All right. I've handed out a second draft of the jury instructions. If you have changes, you can just E-mail them. Otherwise we'll just start at nine on Monday.

MR. ROBERTS: Can I just make a record of the State's objection to the lesser included unlawful imprisonment charge?

THE COURT: Mm-hmm.

MR. ROBERTS: Thank you.

THE COURT: And, Mr. Hurley, do you have any objections with respect to jury instructions that we haven't put on the record yet, since we didn't have a court reporter then?

MR. HURLEY: No.

THE COURT: All right. If any come to mind after you review the draft we'll put them on the record before we start with the jury on Monday. Okay? Is there anything else we should put on the record with regard to the discussion about the counts that occurred in chambers?

MR. HURLEY: Not from my perspective.

MR. ROBERTS: No. I think it's been fairly represented here what occurred.

THE COURT: All right. Have a good weekend, everyone. We're in Recess.

(Court adjourned at 2:41 p.m.)